

To: R1NewsClips[R1NewsClips@epa.gov]
From: Elliott, Rodney
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Subject: Daily - NEWSCLIPS - Friday, October 23rd, 2015 r1newsclips

Report Overview:

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Key events leading up to massive Colorado mine waste spill	10/23/2015	Associated Press Online	NY
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Probe finds EPA error caused mine spill it hoped to avoid	10/22/2015	Advocate Online, The	CT
Univ. of New Mexico to study exposure to mines' metal mixes	10/22/2015	Associated Press	NY
EPA mine spill was preventable, points to broader problem	10/22/2015	Associated Press	NY
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Colorado mine waste spill

Interior finds EPA caused mine spill it hoped to avoid	10/22/2015	Associated Press Online	NY
Probe finds EPA error caused mine spill it hoped to avoid	10/22/2015	Associated Press Online	NY
EPA blamed for spill at Colo. mine	10/22/2015	Boston Globe, The	MA
Interior finds EPA caused mine spill it hoped to avoid	10/22/2015	Boston Herald Online	MA
EPA gold mine spill could have been prevented, investigators conclude	10/22/2015	Hartford Courant Online	CT
EPA Mine Spill Could Have Been Prevented	10/22/2015	New York Times Online, The	NY
Mill leaked cooling water into river ; DEP says the wastewater from the Catalyst Mill in Rumford contained paper fiber but not chemicals.	10/22/2015	Portland Press Herald	ME
EPA gets blame for mine spill into rivers	10/22/2015	Washington Post, The	DC

Climate Change (3)

EPA and partners release new blueprint to protect and restore Long Island Sound	10/22/2015	Hersham Acorn Newspapers - Shelton	CT
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Energy Issues (5)

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Connecticut again near top on energy efficiency	10/22/2015	Greenwich Time Online	CT
UDALL 'OPTIMISTIC' ON POSSIBLE LWCF DEAL TO ALLOW VOTE ON TSCA REFORM	10/22/2015	Inside EPA	VA
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Research and Development (2)

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Toxics (1)

Study Faults E.P.A. for Toxic Wastewater Spill in Colorado Rockies	10/22/2015	New York Times, The	NY
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Water (6)

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Other (1)

Hanover officials hope rate hike will curb water use	10/23/2015	Enterprise - Online, The	MA
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News Headline: VW investigating whether newer motor had trick software | ...

Outlet Full Name: Associated Press Online

News Text: ...may also have been fitted with software that was used to cheat on U.S. emissions tests. The company said after the...

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News Headline: Eco-Energy Strengthens Platform after Renewed Commitments | ..

Outlet Full Name: Concord Monitor Online

News Text: ...to the platform this year alone, continuing as the leader in global biofuels marketing and distribution. While some renewals...

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News Headline: Avon Officials Celebrate Solar Panel Installation At Schools | ..

Outlet Full Name: Hartford Courant Online

News Text: ...shifting the town's energy use toward renewable sources. "We have to take climate change seriously and we are doing what we can in...

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News Headline: EPA DEFENDS RATIONALE FOR AVOIDING DISTINCT 'SECONDARY' OZONE AIR LIMIT | ..

Outlet Full Name: Inside EPA

News Text: EPA is defending the scientific rationale for its decision to avoid setting a distinct "secondary" ozone air standard designed to protect the environment separate from its strengthened "primary" health-based limit issued this month, after White House reviewers told the agency to ensure the decision is based on a review of ozone's welfare effects.

In the Oct. 1 final rule tightening the primary ozone national ambient air quality standard (NAAQS) down to 70 parts per billion (ppb) from the 2008 limit of 75 ppb, the agency says that setting the secondary limit at 70 ppb will satisfy a Clean Air Act mandate that the two standards protect public health and welfare. The rule marks the latest time the agency has refused to set a distinct secondary NAAQS for ozone, after rejecting a similar request in the 2008 rulemaking.

Environmentalists sued EPA over that decision and the U.S. Court of Appeals for the District of Columbia Circuit in a per curiam opinion issued in July 2013 in *State of Mississippi v. EPA, et al.* said the agency's explanation in the 2008 rule for matching the standards was too weak, citing prior court rulings on the issue.

"It is insufficient for EPA merely to compare the level of protection afforded by the primary standard to possible secondary standards and find the two roughly equivalent," the court said, referencing a February 2009 D.C. Circuit ruling in *American Farm Bureau Federation v. EPA*. In that case the court in another per curiam opinion remanded the agency's 2006 annual fine particulate matter NAAQS

to the agency, ordering it to better justify the scientific basis behind its decision to set a level outside the range recommended by its science advisers.

"Because EPA failed to determine what level of protection was 'requisite to protect the public welfare,' EPA's explanation for the secondary standard violates the [Clean Air Act]," the court said.

When the D.C. Circuit subsequently remanded the 2008 secondary ozone standard to EPA for better explanation, the agency eventually said that its October rulemaking would respond to the remand.

While the final version of the ozone NAAQS was under White House Office of Management & Budget (OMB) pre-publication review, one administration official said EPA should set the secondary NAAQS based on a specific analysis of the welfare -- or environmental -- effects of ozone, according to a "Summary of Interagency Working Comments." Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185806)

According to the document, the "Reviewer recommends that the secondary standard be set independently of the primary standard based on an appropriate analysis of the welfare effects of ozone emissions, regardless of whether that standard ultimately ends up being higher, lower, or the same as the primary standard."

In the final ozone rule released Oct. 1, EPA does not appear to explicitly respond to the interagency reviewer's comment -- though it says it "has addressed the court's remand with this final action."

EPA says the secondary limit is "based on judgments regarding the currently available welfare effects evidence, the appropriate degree of public welfare protection for the revised standard, and currently available air quality information on seasonal cumulative exposures that may be allowed by such a standard."

Following that review, EPA Administrator Gina McCarthy concluded that matching the primary and secondary ozone limits would comply with air law requirements, the agency says.

"Based on air quality analyses which indicate such control of cumulative seasonal exposures will be achieved with a standard set at a level of [70 ppb] (and the same indicator, averaging time, and form as the current standard), the Administrator concludes that a standard revised in this way will provide the requisite protection," EPA says. The indicator, averaging time and form are technical terms for implementing the NAAQS.

Environmentalists have long urged the agency to set a distinct secondary NAAQS with a different form and averaging time that is aimed specifically at protecting the environment -- principally plants -- from the harmful effects of ground-level ozone.

The current form of the ozone NAAQS is geared toward protecting humans from ozone exposures, not trees that are cumulatively exposed to ozone over a growing season, critics argue.

This view has garnered some support among EPA staff, and the agency developed a distinct metric for the secondary ozone standard called W126 that measures ozone exposure in parts per million- hours (ppm-hrs).

EPA's Clean Air Scientific Advisory Committee (CASAC) has also recommended that the agency set a distinct secondary standard, using a different form than the primary NAAQS.

However, in its latest final ozone NAAQS, EPA again eschews a distinct form in favor of the setting the primary and secondary standard at the same level, using the same metric.

"In making this decision on the secondary standard, the Administrator focuses on [ozone] effects on tree seedling growth as a proxy for the full array of vegetation-related effects of [ozone], ranging from effects on sensitive species to broader ecosystem-level effects. Using this proxy in judging effects to public welfare, the Administrator has concluded that the requisite protection will be provided by a standard that generally limits cumulative seasonal exposures to 17 ppm hours (ppm-hrs) or lower, in terms of a 3-year W126 index," EPA says.

The rule continues the agency's practice of setting the ozone limits at the same level and using the same "form" and averaging time. Since the 1997 ozone standard, which is expressed as 84 ppb, EPA has set the standard using the annual fourth-highest daily maximum 8-hour concentration, averaged over 3 years.

However, EPA does not set the secondary standard using the W126 form, which means states can avoid crafting distinct state implementation plans (SIPs) for secondary NAAQS attainment that demonstrate how they will show compliance with the novel metric. Instead they can use one SIP for both limits.

EPA's final rule is consistent with the proposed version of the NAAQS, in which the agency analyzed the necessary ozone cuts in terms of the W126 index, but proposed to set the standard using the same form as the primary limit.

In a fact sheet on the proposed version of the rule issued in December, EPA said, "To achieve a level of protection equivalent to 13 to 17 ppm- hours based on the W126 metric, EPA is proposing to set an 8-hour secondary standard at a level within the range of 65 to 70 ppb. EPA analyzed data from air quality monitors and found that setting a standard in a W126 form would not provide additional protection beyond an 8-hour standard."

In March 17 comments on EPA's proposed version of the new NAAQS, a coalition

of nine environmental groups said that, "In selecting a form to protect vegetation EPA must use the best biologically relevant metric. The W126 metric has been recommended to EPA (and found by the EPA Administrator herself) as being the most biologically relevant form in this current review, as well as in the 2006 review and the 2010 reconsideration." The groups included the American Lung Association, Natural Resources Defense Council and Sierra Club.

The groups said, "Our organizations believe that EPA must set a W126 standard of 7 ppm-hrs to be protective of tree growth, foliar health, and to mitigate anthropogenic climate change. This form and level reflects the best protection promoted by the CASAC and by the National Park Service.

"We are dismayed that EPA has left the secondary standard in the shadows in its 2014 proposal. Of particular concern is EPA's unwillingness to propose a W126 standard despite the Agency's clear recognition that this is the correct metric to characterize impacts to vegetation. Such an approach is unlawful and arbitrary," they added.

In its new ozone NAAQS rule, EPA set its final standard at the top of its proposed range -- again leaving open the possibility that other, stricter NAAQS limits set using the W126 metric would be more protective of public welfare. At press time, environmentalists had not publicly confirmed whether or not they will sue EPA over either the secondary standard or their claims that the primary limit is also too weak. -- Stuart Parker

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News Headline: REPUBLICANS, ENVIRONMENTALISTS RAMP UP ATTACKS ON EPA OZONE STANDARD |

Outlet Full Name: Inside EPA

News Text: Republicans and environmentalists are ramping up competing attacks on EPA's decision to tighten its ozone air limit from 75 parts per billion (ppb) down to 70 ppb, with the GOP House holding a hearing on the data behind the standard while advocates claim the agency heeded the utility sector's call not to tighten the limit below 70 ppb.

The fights over whether the standard is unnecessarily stringent or unlawfully weak under the Clean Air Act continue more than two weeks after EPA issued its Oct. 1 decision to tighten the 2008 limit of 75 ppb. While the rule was undergoing White House Office of Management & Budget (OMB) review, sources told Inside EPA that the agency had selected 70 ppb for the standard but that some White House officials were seeking a 68 ppb standard.

That article, and subsequent coverage by other news organizations, prompted House

science panel Chairman Lamar Smith (R-TX) to seek information from EPA Administrator Gina McCarthy and White House Chief of Staff Denis McDonough. Smith said he has concerns that the alleged push for the 68 ppb standard was for "purely political reasons" and not based on scientific evidence on ozone's impacts on humans, as required by law.

In an Oct. 6 response to Smith, EPA Associate Administrator Laura Vaught says that EPA has posted in a public docket details of written comments it received from OMB on its drafts of the final ozone standard rule and the Regulatory Impact Analysis that accompanied it, as well as EPA's written responses.

"In light of the rule's promulgation, setting the standard at 70 ppb, we are confident that the documents available in the docket will assuage your earlier concerns, and simply validate that the interagency process was used appropriately, as always, to ensure that the American people have an ozone standard that was thoroughly analyzed and grounded in science," she writes. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185788)

But the documents available in the docket at press time do not appear to reveal much if any debate over the 70 ppb standard or address questions that Smith raised in his letter about a possible 68 ppb limit.

House Science, Space & Technology Committee staff say that as of press time, EPA has not supplied any documents about the ozone national ambient air quality standard (NAAQS), nor had the White House replied to the letter addressed to McDonough, despite Smith setting an Oct. 8 deadline for a response.

"Just because the rule was released at 70 ppb does not mean that the White House did not put pressure on the EPA to enact a lower ozone standard at the behest of the environmental lobby," a House GOP source says.

The House science panel at press time was slated to hold a hearing Oct. 22 to discuss the science behind the new NAAQS, during which such allegations may resurface.

The hearing will feature as witnesses former George W. Bush EPA air policy chief Jeff Holmstead, now an industry attorney with Bracewell & Giuliani, Michael Honeycutt, director of toxicology for the Texas Commission on Environmental Quality and Seyed Sadredin, executive director of the San Joaquin Valley Air Pollution Control District in California -- all of whom have questioned the need for a stricter ozone limit.

Under the Clean Air Act as interpreted by the courts, EPA must set a primary NAAQS -- designed to protect the public health "with an adequate margin of safety" -- based exclusively on the scientific record before the agency and without considering implementation costs. EPA earlier proposed setting the NAAQS at a level within a range of 65 ppb to 70 ppb, tougher than the former level of 75 ppb set by the Bush

administration in 2008.

In the final rule, not yet published in the Federal Register, EPA opted to set the primary NAAQS at 70 ppb, at the top of the range twice unanimously recommended by the agency's Clean Air Scientific Advisory Committee (CASAC). EPA set the secondary standard, designed to protect the environment, at the same level.

On an Oct. 15 webinar hosted by the Environmental Law Institute (ELI), John Walke -- an attorney with the Natural Resources Defense Council (NRDC) and a former EPA air official -- again reiterated environmentalists' outcry over the outcome of the ozone NAAQS rulemaking. "We believe it to be a failure of responsibility," Walke said, a "missed opportunity" to set a truly health-protective standard and a "stunning" decision.

Environmental and public health groups including NRDC lobbied EPA to set the standard at 60 ppb, pointing to evidence of adverse health effects even at this low level. Industry and mostly Republican lawmakers at the state and federal levels, and also some Democrats, strongly countered this push with their own campaign for EPA to leave the NAAQS unchanged, warning of severe economic impacts from compliance with a tougher rule.

All sides in the debate concede that EPA has a very strong record of defending its NAAQS rules for the six "criteria" air pollutants in appellate court challenges. The agency successfully defended its 2008 ozone NAAQS set at 75 ppb from environmentalists' claims that it was too weak, and industry claims it was unjustifiably stringent, despite setting the limit at a level weaker than the 70 ppb then recommended by CASAC.

EPA therefore enjoys considerable discretion to set the standards based upon its interpretation of the science, so long as it clearly explains its rationale. To win in court, litigants contesting a NAAQS must prove the agency's decision-making was "arbitrary and capricious" -- which is hard to substantiate based on the scientific record.

Nevertheless, Walke on the call hinted at possible arguments that supporters of a more-stringent primary NAAQS could make in any future suit filed in the U.S. Court of Appeals for the District of Columbia Circuit.

Walke contrasted the most recent ozone NAAQS review with a discretionary previous rulemaking effort undertaken by former Obama EPA Administrator Lisa Jackson in 2011. Spurred by environmentalists' arguments that the Bush EPA wrongly ignored CASAC to set the standard at 75 ppb, Jackson advocated a 65 ppb standard, Walke said, based on the science then available -- though she eventually sent to OMB for review a final 70 ppb limit.

President Obama then directed EPA to set the rulemaking aside. The White House

justified the decision by arguing that the reconsideration was a discretionary decision and would have imposed an unreasonable implementation burden on states when they were still implementing the 2008 standard. At the time, a mandatory five-year review of the ozone NAAQS was due in March 2013, although EPA slipped behind schedule in meeting this mandate.

Walke on the webinar criticized McCarthy's public statements to the effect that additional evidence gathered since Jackson's reconsideration justifies setting the Oct. 1 NAAQS at 70 ppb. "In fact the opposite is true," Walke said, pointing to new studies showing adverse health effects at lower levels of ozone.

Walke noted CASAC's advice to EPA that a 70 ppb NAAQS would offer little if any margin of safety. In a June 26, 2014 letter, CASAC said, "Although a level of 70 ppb is more protective of public health than the current standard, it may not meet the statutory requirement to protect public health with an adequate margin of safety."

CASAC concluded, "our policy advice is to set the level of the standard lower than 70 ppb within a range down to 60 ppb, taking into account your judgment regarding the desired margin of safety to protect public health."

EPA said it based its 70 ppb decision on the assumption that a level of 72 ppb protects healthy adults, and that 70 ppb offers the necessary margin of safety to protect vulnerable populations such as children and asthmatics. Walke compared the Bush EPA's decision to set the standard at 75 ppb, based on an assumption that 80 ppb was safe and a 5 ppb margin of safety would be adequate, with the Obama EPA's 2 ppb margin of safety.

Walke also noted a Sept. 25 meeting held shortly before the release of the final NAAQS between EPA senior officials including acting air policy chief Janet McCabe and officials from the Edison Electric Institute (EEI), representing the electric generating sector, which backed a 70 ppb limit.

Although EPA had by this stage already sent its final rule set at 70 ppb to the White House Office of Management and Budget (OMB) for pre-publication review, Walke notes the support of EEI for a 70 ppb standard in a document presented at that meeting and subsequently entered into the public record.

In that document, titled "Reasons the Agency Should Finalize an Achievable Level of 70 ppb," EEI said that the agency "could choose to retain the current standard, but it is clear that the Agency will be revising the standard downwards. A final ozone standard of no lower than 70 ppb . . . would both provide real environmental benefit and give states a reasonable path forward to implement the final standard."

EEI based this opinion on concerns that a tougher standard than 70 ppb would be too difficult to implement, especially for the power industry which must also comply with EPA's Clean Power Plan to curb greenhouse gas emissions.

The group was further concerned that a standard set below 70 ppb risks making implementation impossible in parts of the West that experience high "background" ozone that stems from natural causes and foreign emissions, because high background levels that regulators cannot control could reach or exceed an even tougher NAAQS.

EEI said EPA has "ample" scientific support for a 70 ppb standard. "EPA relies on both controlled human exposure studies and epidemiological studies in assessing impacts of a lowered standard and these studies support finalizing a standard at 70 ppb, provide real environmental benefit while also remaining implementable for states and the business community," according to the document.

Previously, EEI in March 17 comments on the proposed version of the NAAQS said it "recommends that EPA should retain the current level of the primary ozone standard at 75 ppb. Numerous commenters note that there exists no strong justification for lowering the primary standard from its current level. Indeed, the record provides ample justification for retaining the current standard."

But the comments added that, "Should EPA nonetheless determine that a revision of the standard is necessary, the Agency should not set the final primary standard below the top end of its proposed range of 70 ppb." -- Stuart Parker

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News Headline: D.C. CIRCUIT UTILITY MACT DECISION WILL TEST HANDLING OF FLAWED EPA RULES |

Outlet Full Name: Inside EPA

News Text: A former top Department of Justice (DOJ) official says the U.S. Court of Appeals for the District of Columbia Circuit's impending decision on whether to vacate EPA's utility air toxics rule after the Supreme Court found flaws in how EPA crafted it will be a major test for how the D.C. Circuit handles rules found partially, but not fully, unlawful.

Thomas A. Lorenzen -- a former assistant chief of DOJ's environmental defense section -- said during an Oct. 15 Environmental Law Institute (ELI) panel discussion that the appellate court's long-awaited decision poses "an interesting test" for when the D.C. Circuit will remand a rule to the agency for revision without vacatur. The Supreme Court faulted EPA for not considering costs in deciding to craft the rule, but did not weigh in on the merits of the rule.

Unlike most situations where EPA seeks to keep a rule in effect during remand, Lorenzen said EPA's finding that the rule was "appropriate and necessary" that the Supreme Court struck down is a "threshold question for the rule," meaning that if

EPA cannot satisfy the high court's mandate the entire rule would have to be withdrawn. That differentiates the case from other situations where courts overturn a more limited aspect of a contested rule, he said.

EPA in filings in the ongoing D.C. Circuit litigation over the utility maximum achievable control technology (MACT) air toxics rule is urging the court to reject calls from some states and industry groups to vacate the regulation. Critics argue that rule is now unlawful as the high court scrapped the basis for the appropriate finding, but the agency counters that the D.C. Circuit routinely leaves flawed rules in place while EPA amends them.

The high court's 5-4 ruling June 29 in *Michigan v. EPA* found that the agency erred by not assessing costs in its initial finding that a utility MACT was appropriate and necessary under the Clean Air Act. However, it did not say what the ultimate fate of the rule should be, nor did it say whether the rule was flawed on its merits.

In *Michigan*, the justices rejected EPA's reading of the air law that costs should only be considered when setting a specific standard, which speakers on the ELI panel said could signal a shift in how they will apply the landmark 1984 Supreme Court deference ruling *Chevron v. Natural Resources Defense Council*. Under *Chevron*, judges are supposed to defer to an agency's "reasonable" interpretation of ambiguous statutory text even when other interpretations are valid, based on the principle that each agency is expert in the areas it regulates.

EPA is now asking the D.C. Circuit not to vacate the utility MACT, arguing instead that it should remain in effect while the agency crafts a new appropriate finding that includes cost considerations. EPA has argued that it expects to find that the rule as it exists today is still justified even when costs are considered.

Several states and industry organizations, however, argued in a Sept. 24 joint brief and subsequent Oct. 21 response brief that the *Michigan* decision requires invalidating the entire rule, in part to avoid forcing industry to comply with its \$158 million annual recordkeeping mandate. But ELI panelist and industry attorney Shannon S. Broome said that argument appears less likely to succeed than it would have in past years.

"The norm is supposed to be that regulations are vacated, but now we are increasingly seeing, in the D.C. Circuit, at least, that they are not vacated" but rather remain in effect during a remand, Broome said.

The arguments over vacating the MACT follow a ruling by a D.C. Circuit panel that backed EPA's request for remand without vacatur of another air rule. In that suit, *Conservation Law Foundation (CLF), et al. v. EPA*, the court sided with EPA on the disposition of its rule granting a 50-hour exemption from air emissions regulations for reciprocating internal combustion engines (RICE) generators used in "non-emergency" demand response programs.

Following a separate panel's decision to strike down a related RICE exemption, EPA sought remand without vacatur of the 50-hour rule, which the CLF court granted in an unsigned Sept. 23 order despite claims by environmentalists and their allies that only a complete vacatur would be appropriate.

Members of the ELI panel said the high court has recently focused on exceptions to Chevron, which could have major implications for its rulings on EPA's statutory authority to craft its high-profile rules on power plants' greenhouse gas (GHG) emissions, and the reach of the Clean Water Act (CWA).

Along with its Michigan decision, the high court also read Chevron narrowly in *King v. Burwell*, where it agreed with the Obama administration's reading of the health care law in a 6-3 decision issued June 25 -- but pointedly declined to defer to regulators' views and instead reached the same conclusion through its own analysis of the text.

Justices Antonin Scalia, Samuel Alito and Clarence Thomas also penned opinions in those cases and in *Perez, et al., v. Mortgage Bankers Association, et al.*, dealing with agencies' discretion to revise their interpretations of rules, that cast doubt on the Chevron framework.

Thomas in particular argued in his *Perez* concurrence that it violates the Constitutional separation of powers for judges to defer to agencies' interpretation of the law rather than to reach their own conclusions.

At the ELI event, panelist Aditi Prabhu, an attorney with EPA's Office of General Counsel, said, "I don't think agencies are that worried about Chevron disappearing" because none of the other justices have signaled they might consider that step.

"There are no indications that there are really enough votes to overturn Chevron right now. Instead, what's happening appears to be that Chevron is being chipped away. Recent decisions have either applied Chevron reluctantly or invoked exceptions," she said.

How those decisions apply to EPA will be tested in the near future when the justices consider its CWA jurisdiction rule and the power plant GHG standards, known as the Clean Power Plan, panelists said. The CWA rule is already the subject of a host of suits in federal circuit and district courts thanks to confusion over provisions of the water law that assign review of some rules to appellate court but not others.

Decisions on which court should hear the cases are expected to reach the Supreme Court -- possibly in the near future, since the 6th and 11th Circuits are each poised to issue rulings on their authority over such challenges this fall.

Meanwhile, critics of the Clean Power Plan are developing legal strategies for

challenging that set of rules as soon as EPA formally publishes them in the Federal Register, with an eye toward a swift ruling on the agency's authority to regulate the power sector's GHG emissions at all.

Panelist Pamela Campos, an attorney for the Environmental Defense Fund, said environmentalists also expect Chevron to remain in place but be treated more narrowly. "We should continue to expect that Chevron deference is going to be the norm, but also continue to assess whether there are risks that would lead the justices away from a traditional application" of the precedent, she said.

Campos added that chief among those "risks" are "corner-case facts -- extreme, compelling, hit-you-in-the-gut facts that may frame and anchor the justices' ideas as they turn to whether Congress intended to delegate interpretive authority to the agency and then the reasonability of the interpretation."

Panelists also discussed justices' critiques of deference to agencies on their readings of rules, as established in the 1997 case *Auer v. Robbins*. Scalia, Alito and Chief Justice John Roberts wrote in dissents to the 2013 CWA case *Decker v. Northwest Environmental Defense Center* that they would consider overturning *Auer*, and Alito and Thomas in *Perez* concurrences laid out legal arguments for doing so.

Scalia in particular argued in his *Perez* and *Decker* opinions that *Auer* encourages agencies to write vague rules they can interpret as they see fit. But during the panel discussion, Aditi sought to counter that claim, saying that agencies do not depend on *Auer* deference in writing regulations, in part because it would be difficult or impossible to reliably write rules vague enough to re-interpret under *Auer* but not so vague that they will be rejected as unworkable.

"Clear regulations increase compliance -- regulations can only be enforced if they're clear. . . . and there's the boundary on what counts as an interpretation and not a completely new legislative rule," she said.

Broome agreed with Aditi's argument. While industry has problems with how agencies conduct rulemakings, "I don't think agency staff are sitting there when they're writing rules saying, 'Oh, let's make this as vague as possible so we can screw somebody in an enforcement action 10 years down the line,'" she said. -- David LaRoss

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News Headline: EPA SUGGESTS UTILITY MACT REASSESSMENT WILL
LIKELY PROJECT LOWER COSTS |

Outlet Full Name: Inside EPA

News Text: EPA is suggesting that its pending review of the costs and benefits of its

power plant maximum achievable control technology (MACT) air toxics rule will likely show lower compliance costs for the rule than previously estimated, aiming to boost its call for a federal appeals court to reject vacatur of the rule while EPA does the review.

The Supreme Court earlier this year remanded the MACT back to the U.S. Court of Appeals for the District of Columbia Circuit after faulting EPA for not considering costs in its initial review determining that Clean Air Act MACT regulation of utilities was "appropriate and necessary." The justices in their 5-4 ruling rejected the agency's argument that it considered costs at a later date when it set the rule's actual hazardous air pollutant limits.

The D.C. Circuit in *White Stallion Energy Center, LLC, et al. v. EPA*, is now weighing how to proceed with the rule. A coalition of state and industry groups opposed to the MACT last month filed motions with the court urging it to vacate the regulation outright, saying the high court invalidated the original basis for crafting the rule.

But the Department of Justice (DOJ) on EPA's behalf counters in an Oct. 21 response that legal precedent shows that the court regularly remands regulations to the agency without vacatur to address legal flaws. And the agency adds that it is working on an accelerated schedule to craft a cost analysis to address the Supreme Court's ruling. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185866)

DOJ cites a declaration from acting EPA air chief Janet McCabe that the agency "has already begun the process of reviewing available information relevant to cost" in response to the high court's ruling.

"Relevant staff have been assigned to the project, and [EPA] has established a detailed internal schedule with the goal of completing the proposed consideration in the next few months," McCabe wrote. The agency has a goal of finalizing its analysis of cost considerations "as close to April 15, 2016 as possible."

DOJ says that EPA, by analyzing the costs of regulating the utility sector with a MACT, can then use those figures to satisfy the requirement to weigh costs as part of the appropriate and necessary finding. DOJ also notes that the Supreme Court in its ruling on the MACT in *Michigan v. EPA* "explicitly declined to limit EPA's discretion as to how to consider costs on remand . . . and there are many reasonable approaches for doing so."

The filing says the request to vacate on the cost issue is premature. Industry and state petitioners seeking vacatur will have an opportunity to comment on EPA's approach and to challenge that final determination in the D.C. Circuit "if EPA concludes that regulation of power plants remains appropriate after considering costs. Any attempt to challenge EPA's consideration of costs is not properly before this Court at this

time," DOJ says.

The agency's critics argue that vacatur is appropriate because the utility MACT will continue to impose costs such as the \$158 million recordkeeping requirements if the court leaves it in place. They also faulted the rule as only providing \$4 million to \$6 million in health benefits to further undermine the case for retaining the rule.

But DOJ counters that the \$4 million to \$6 million figure only represents quantifiable benefits directly related to the rule's regulation of mercury emissions, and does not account for co-benefits from reducing other hazardous air pollutants, as well as related benefits of reducing criteria pollutants such as fine particulate matter (PM_{2.5}). The total quantifiable benefits of the utility MACT are estimated to be three to nine times the total cost, DOJ says.

Projecting a major benefit to cost ratio would boost any renewed conclusion that it is appropriate and necessary to regulate power plants, and counter claims of large costs for minimal benefits. DOJ hints that EPA in its upcoming cost review will find lower costs than before, noting that the prior cost estimate -- done at the time of crafting the rule's emissions limits -- is already several years old and "likely overestimates compliance costs."

DOJ also cites EPA's "ambitious" plan to quickly craft the new cost analysis to bolster its push for keeping the rule in place on remand, warning of major disruption if the court scraps it.

If the D.C. Circuit were to vacate the rule, plants that have installed pollution controls to comply might turn them off, DOJ says, which would lead to increases in air pollution harmful to human health. And facilities scheduled to shutter instead of comply could drop those plans and resume operating, DOJ warns.

The coalition of state and industry opponents of the rule counter in an Oct. 21 response that the Supreme Court invalidated the "foundation" of the rule -- the agency's finding that it is appropriate to issue a utility MACT.

"Because the Supreme Court determined the Rule has no lawful basis, the whole Rule exceeds EPA's statutory authority and so must be vacated," says the filing, echoing earlier arguments (Inside EPA, Oct. 2).

The industry groups backing the filing are the White Stallion Energy Center, the National Mining Association, the Gulf Coast Lignite Coalition, and the Oak Grove Management Company. The states supporting the filing are Alabama, Alaska, Arizona, Arkansas, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia and Wyoming.

They argue that "vacatur is required when there is no possibility an agency can

clarify or explain its action; in that situation, any disruptive consequences of vacatur deserve no weight. Here, EPA fully explained its interpretation that costs are irrelevant when deciding whether regulation is appropriate, and the Supreme Court held that interpretation was unreasonable," and therefore the court must vacate the utility MACT.

The filing also faults EPA's claim that it "might adopt a new rationale on remand" to justify the utility MACT by relying on the benefits from reductions in PM2.5 emissions achieved as a co-benefit of the rule. The filing says that EPA already regulates PM2.5 under a national ambient air quality standard. "If EPA now believes that public health is not adequately protected from fine particulate matter and wants to impose stricter regulations on that pollutant, it should do so under" the national ambient air quality standards program, the industry and state petitioners say.

"Any benefits from further reducing fine particulate matter are not relevant for deciding whether regulating hazardous air pollutants is appropriate" under the air law," the filing says. "And that rationale is not a clarification of EPA's action; it is a new basis for a different 'appropriate' finding" compared to once again declaring the initial appropriate finding to be correct "and thus does not support leaving the Rule in place."

EPA's long-running practice of citing co-benefits of reducing pollutants not targeted by a rule in order to justify the regulation faces an uncertain future following the Supreme Court's Michigan decision, observers have said, as the ruling suggests both support for and opposition to the practice (Inside EPA, July 17).

Justice Antonin Scalia wrote the June 29 opinion for the 5-4 majority in Michigan, in which he said, "It is not rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits" -- which appears to echo industry claims that discounting co-benefits from a cost-benefit analysis of the MACT yields minimal benefits yet projects massive costs.

Environmentalists disagree that Scalia's ruling suggests that some Supreme Court justices might not look favorably on the use of co-benefits. One environmental lawyer says EPA should take comfort from the court's failure to take up the co-benefits question, despite intense lobbying from industry groups, including the U.S. Chamber of Commerce, to do so. "I don't think that point will go unnoticed by EPA," the source says.

Further, Scalia explicitly does not require a full-blown quantified cost-benefit analysis in the "appropriate and necessary" finding, only a broad consideration of cost. EPA will likely take a broad, "tapestry" approach to a revised cost-benefit analysis, including consideration of both indirect benefits and costs, the source says. -- Anthony Lacey

News Headline: EPA EYES STRICT ADHERENCE TO REDUCED CAP FOR FARMS' SPCC OBLIGATIONS |

Outlet Full Name: Inside EPA

News Text: EPA in consultation with the Department of Agriculture (USDA) is launching a rulemaking expected to reduce the number of farms subject Oil Spill Prevention, Control and Countermeasure rule (SPCC) to comply with a statutory cap, and the agency is hinting that it will require full adherence to the cap without allowing any exemptions.

The 2014 Water Resources Reform and Development Act (WRRDA), which authorizes water resources projects but also included substantive water policy changes, commands EPA and USDA to craft the reduced cap, in order to address concerns from farms about being subject to onerous SPCC mandates. The cap is based on a facility's oil storage and dictates when farms must craft control plans and adopt protective measures to prevent accidental spills.

Prior to WRRDA's enactment, SPCC requirements applied to any facility with at least 1,320 gallons of aggregate above-ground oil storage -- the level which EPA determined poses a risk to protected waters. EPA's SPCC regulation requires facilities to take prepare spill response plans designed to prevent and manage the risk of oil spills.

The rule's definition of "oil" includes edible oils such as animal fats, so milk is considered an oil and therefore subject to control requirements, according to the agency. That means dairy farms storing more than 1,320 gallons of milk must prepare oil spill response plans, which critics say imposes major costs on dairy farms.

But WRRDA exempts all farms with less than 2,500 gallons of oil storage from the rule, and raises the exemption to 6,000 gallons for farms with no documented record of spills. However, the law allows for EPA and USDA to tighten or eliminate entirely the zero-spill exemption, as long as the minimum threshold for regulation remains 2,500 gallons.

The law says SPCC shall: "not require compliance with the rule by any farm -- (A) with an aggregate aboveground storage capacity greater than 2,500 gallons and less than the lesser of -- (i) 6,000 gallons; and (ii) the adjustment quantity established under subsection (d)(2); and (B) no reportable oil discharge history."

EPA's upcoming rulemaking will set the "adjustment quantity," and the agency in a recent report is suggesting that it plans to set it at 2,500, effectively eliminating the exemption in that clause. That would ensure strict adherence to the reduced cap

imposed under the water law without any further exemptions in the new rule.

EPA announced the rulemaking in its August "Action Initiation List" (AIL) of new regulations, dated Sept. 28. The agency plans to issue a proposed version of the rule within 12 months, according to the AIL.

Based on the June report crafted by EPA and USDA to inform the upcoming SPCC rulemaking, it appears likely the agencies will opt to strike the separate exemption for farms with no history of spills, since the report concludes that no information warrants an exemption from SPCC requirements at any level of storage.

"EPA did not receive information to justify exempting farms or otherwise treating oil storage at farms any differently than oil storage at other businesses with similar storage capacities. . . . Review of the data led EPA in the past to conclude that oil storage on farms is not unique. As explained in the rulemaking record, EPA has received no data or found any rationale to treat farm-related oil storage differently than other sector oil storage," the study says. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185745)

The report -- crafted by EPA's Office of Emergency Management in consultation with USDA's Natural Resources Conservation Service -- argues that regardless of the new minimums established under WRRDA, the agency could find no data that farms should be subject to separate reporting or spill prevention mandates. "The study shows that it is appropriate to maintain its existing threshold of 1,320 gallons for all facilities in order to maintain [an] adequate level of environmental protection of the nation's waters," it says.

Given that WRRDA sets an absolute floor of 2,500 gallons for SPCC regulation, the report says, the agencies favor subjecting all farms at or above that level to the same requirements for oil spill controls.

"Given the information presented in this study, the agency's record and the lack of data to support any higher threshold, it is appropriate to set the threshold for farms at the minimum aggregate aboveground oil storage capacity of 2,500 gallons established under the WRRDA amendments. EPA maintains that requiring measures such as adequate containment, periodic inspection of containers, and regular review of oil handling practices, is an appropriate way to address the risk of spills to waters for farms within the 2,500 to 6,000-gallon aggregate aboveground oil storage capacity range," according to the report.

The 6,000-gallon figure "is several orders of magnitude greater than the long-established criteria for discharges of oil that may be harmful, which were based on evidence of significant harm at concentrations in the range of parts per million," the study says.

Republican legislators pushed for an agricultural exemption from SPCC in WRDDA

in response to EPA's controversial Clean Water Act jurisdiction rule, which critics have charged both radically expands and confuses the reach of the law, eventually adding the language as an amendment to WRRDA before enactment.

WRRDA also allows facilities with up to 20,000 gallons of aggregate above-ground storage to self-report their compliance rather than be subject to EPA SPCC inspections, effectively exempting many smaller facilities from having to develop spill prevention plans, including many farms that store fuel on-site.

SPCC applies to facilities that have significant storage of oil with the potential to reach protected waters -- a standard that proponents of the agricultural exemption said would be more difficult to apply under the jurisdiction rule. -- David LaRoss

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News Headline: EPA URGED TO PROVIDE DATA JUSTIFYING PROPOSED FY17-19 ENFORCEMENT FOCUS |

Outlet Full Name: Inside EPA

News Text: EPA is facing calls from major industrial sectors to provide exhaustive data on environmental law violations and harms to justify the agency's proposed new fiscal year 2017-2019 enforcement priorities, with industries such as the chemical and oil sector saying EPA has failed to prove non-compliance to warrant focusing on them.

Environmentalists, meanwhile, are using their comments on the agency's proposed national enforcement initiatives (NEI) to seek a strict focus on reducing water pollution from animal feedlots. "In light of the size and pollution potential of these facilities, along with the lack of comprehensive information on the industry, and its history of noncompliance, EPA must continue to prioritize animal waste in order to take the meaningful action that the American people deserve," say the Natural Resources Defense Council (NRDC) and the Yale Environmental Protection Clinic.

EPA took comment through Oct. 14 on its proposal to establish three new NEIs: reducing industrial water pollution, targeting accidents and spills at industrial facilities, and reducing air toxics at the community level. The air toxics initiative would be an expansion of an existing NEI to cover additional industries and emissions sources. The agency uses the NEIs to prioritize enforcement funds, a crucial decision at a time of limited budgets. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185862)

In the proposal EPA also sought input on whether to revise its six existing NEIs: reducing air pollution from the largest sources, cutting hazardous air pollutants, ensuring energy extraction operations comply with environmental laws, reducing pollution from mineral processing operations, keeping raw sewage and contaminated

stormwater out of water and preventing water contamination from animal waste (Inside EPA, Sept. 18).

NEIs allow EPA to focus more of its enforcement budget on high-priority targets. EPA takes comment every three years on which current initiatives it should drop and whether to add new areas of focus.

But the industry groups argue in their comments that EPA must demonstrate a pattern of excessive violations and environmental damage from a sector before designating it for special focus with an NEI, and that the Sept. 15 proposal includes no such support. Various sectors attack the proposal as including little proof supporting the agency's claims of frequent environmental violations requiring special attention in sectors such as the oil industry, concentrated animal feeding operations (CAFOs), wastewater treatment systems and energy extraction.

"In the notice, EPA presents no information or data suggesting that there is significant noncompliance in the petroleum sector or that emissions from the sector present any significant risk to health or the environment. If EPA plans to continue to target this sector as part of a national enforcement priority, EPA should present the data on which the Agency is relying and allow for public comment on these data before EPA finalizes its priorities," the American Petroleum Institute (API) says in Oct. 14 comments.

"Nowhere in the NEI notice has EPA presented any evidence of significant noncompliance in the petroleum sector. More importantly, nothing in the notice or related materials supports a finding that there are significant health or environmental concerns related to this sector," API adds.

The American Chemistry Council (ACC) in separate Oct. 14 comments attacks EPA's "broad allegations that industry commits 'widespread violations' of the law, recklessly endangers the public, and that it is 'all too common' for industry to kill or injure employees or emergency responders. It further asserts that 'noncompliance is a growing threat.'"

The group adds that it "strongly disagrees with these characterizations and asks EPA to produce the data it is relying upon to make these statements (to the extent that subjective terms like 'widespread' and 'common' are even capable of validation through data analysis)."

The Corporate Environmental Enforcement Council (CEEC), which represents a host of industrial sectors, in Oct. 14 comments says the proposed NEIs include both claims of outright environmental law violations and claims that sectors exceed projected pollution releases -- which it says are not necessarily violations requiring enforcement action. "For example, EPA's existing and proposed NEI for 'cutting toxic air pollution' is predicated on data showing that toxic air pollution is 'much greater than what had previously been estimated.' While this may go to the

importance or relative severity of the problem, it does nothing to show that noncompliance is a significant contributing factor," CEEC says.

Similarly, the National Cattlemen's Beef Association -- whose members include CAFOs subject to the animal waste NEI -- argues that in addition to evidence of violations for new initiatives, the agency should also show that active NEIs are successfully reducing pollution to justify continuing them.

"EPA has not demonstrated a need to reinstate the NEI for animal waste contamination. There is a lack of evidence to show that actions undertaken pursuant to the prior NEI have actually improved water quality. It is unclear then why EPA should reinstate this NEI for 2017-2019," it says in Oct. 14 comments.

Environmental groups, meanwhile, focus their comments almost exclusively on a single NEI: the animal waste enforcement initiative, which the advocates said should be among EPA's highest priorities for enforcement.

Many CAFOs currently operate without federal Clean Water Act (CWA) permits on the grounds that they do not discharge waste to protected waters, but environmentalists have long claimed that even "zero discharge" CAFOs cause frequent accidental releases, or discharge surreptitiously.

"Even when these facilities are required to obtain CWA permits, as less than half of them currently are, they are allowed to operate under a 'zero discharge' falsehood, as there are no sampling and monitoring requirements within the EPA-sanctioned permitting scheme to ensure compliance with this no-discharge standard," an alliance of 15 environmental groups say in joint Oct. 14 comments.

EPA at one point tried to require all CAFOs to seek CWA discharge permits, but a 2008 rule to that effect was struck down by a 2011 decision of the U.S. Court of Appeals for the 5th Circuit, *National Pork Producers v. EPA*. In that case, a three-judge panel unanimously held that the agency could only require permits for actual discharges, not proposed or probable discharges.

The agency later floated and abandoned a rule proposal that would have required CAFO operators to submit operating data to EPA that regulators could use to track the locations and potential hazards of high-density feedlots. In their separate Oct. 14 comments, NRDC and the Yale Clinic say the lack of a reporting rule means the agency has reliable data on the locations and operations of just 35 percent of CAFOs.

States in their comments generally do not focus on specific NEIs but urge EPA to work more closely with local and state regulators in carrying out the initiatives.

The Environmental Council of the States, which represents many state environment departments, says in Oct. 14 comments that "In order for the final NEIs to be effective, EPA must collaborate with states so that the Agency's actions are informed

by how states are addressing these NEI sectors within their state borders. The final NEI notice should specifically discuss how EPA plans to work with states in their implementation as co-regulators and through joint governance."

Wyoming, in separate Oct. 14 comments, urges EPA to embrace a cooperative federalist framework as it implements the NEIs, including sharing information requests with states and providing clear guidance to state regulators on conducting inspections under the new enforcement initiatives. "State compliance staff must be afforded the opportunity to participate in field investigation, case development and enforcement activities that are initiated or directed by the [EPA] Regional Office," the state says.

EPA's final NEIs for FY17-19 will be an important decision in the current budget climate since EPA is facing cuts in the coming fiscal year to both its overall funding and to the enforcement office in particular.

The agency's Office of Enforcement & Compliance Assurance is part of its Environmental Programs and Management account (EPM), currently funded at \$2.61 billion. President Obama's FY16 proposal would allocate \$2.84 billion for EPM, but both chambers of Congress are seeking reductions instead. The House's now-scrapped FY16 bill would have funded it at \$2.47 billion while Senate legislation sought a funding level of \$2.56 billion.

Thanks to the expected cuts, EPA says in the proposal it will adapt the plans to its "next generation" compliance framework, which aims to overhaul environmental enforcement to rely less on site inspections to force compliance, and more on advanced monitoring, electronic reporting and self-implementing rules.

But while many industry groups have welcomed the next generation regime, API in its comments on the NEIs outright opposes the change, calling it "an overt and misguided effort by EPA to shift enforcement responsibility away from the Agency."

Next generation compliance "imposes undue burdens on regulated entities and encourages third-party enforcement, which is not calibrated by the checks and balances that apply to EPA and Department of Justice enforcement programs. In addition, such ad hoc and inconsistent oversight threatens the privacy and confidentiality of API members' operations. It also erodes the uniformity and regularity of federal requirements," API says in its comments. -- David LaRoss

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News Headline: WASTEWATER UTILITIES PRESS EPA FOR ACTION ON SEWAGE SLUDGE INCINERATORS |

Outlet Full Name: Inside EPA

News Text: Wastewater utilities are pressing EPA to address several industry concerns about Clean Air Act regulation of sewage sludge incinerators (SSIs), arguing utilities face uncertainty over whether they can continue to operate their SSIs if the agency is delayed in issuing a federal implementation plan (FIP) for new emission guidelines in lieu of missing or inadequate state plans.

"We are very frustrated with EPA's lack of progress on the FIP and the confusion it is creating for our members," a wastewater utility source says. Some utilities "are being told that they won't receive their permits or approvals to continue operating until the FIP is final," and EPA has also not responded to a 2014 petition from the National Association of Clean Water Agencies (NACWA) asking the agency to stay and reconsider the new emission guidelines.

NACWA in an Oct. 5 letter to EPA acting air chief Janet McCabe asks the agency to respond to the petition "as soon as possible to give our members the certainty they deserve on this issue," as well as providing a clear timetable for when the FIP will be released and an action plan to ensure utilities will continue to operate their SSIs "if the FIP is not issued with sufficient time to complete the necessary permitting in advance of the March 21, 2016 compliance deadline." Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185739)

NACWA first asked McCabe in a May 2014 petition to reconsider and stay EPA's Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units, known as the SSI rule. The rule, first published in 2011, set emissions limits for SSIs covering both toxic and other pollutants under sections 111 and 129 of the air act, set new source performance standards (NSPS) for new and modified sources, and set emission guidelines for existing sources that began construction prior to October 2010.

Section 129 requires that EPA set maximum achievable control technology (MACT) emissions limits for incinerators, meaning the agency sets MACT "floors" or minimum emissions standards. The floors are determined using the average emissions of the 12 percent least-polluting sources in a given source category. EPA, in its SSI rule, used an upper prediction limit model to predict the real-world performance of SSIs -- a method unpopular among environmentalists who say the method is not a true average.

NACWA has argued that the SSI MACT regulation is excessively stringent and should be set under section 112 of the CAA rather than 129. The group challenged the rule in the U.S. Court of Appeals for the District of Columbia in *NACWA v. EPA*, where the court in August 2013 found that EPA correctly applied section 129, but remanded EPA's MACT standards so that the agency could further explain its use of upper prediction limit models, as environmentalists had requested.

NACWA in its petition says that because the court found EPA has the authority to set the emissions limits under either section 112 or 129, the agency should stay the

rule while it reconsiders regulation of SSIs

"A stay is necessary to prevent irreparable harm because, absent a stay, municipalities and public clean water agencies around the country will be forced to spend non-recoupable public funds for compliance with emissions standards applicable to existing units, or to ensure that new units comply with new source performance standards, when those standards may change during the ongoing remand," the petition says.

While NACWA says it is still seeking an answer to its petition, "[a] more immediate and serious concern is the significant delay in issuance of a final FIP," the Oct. 5 letter says. "Many of our members across the country are being told that their permits will not be issued or final clearance to operate will not be given until the FIP is released. While our members have made substantial time and resource commitments to comply with these requirements, your office's delay in issuing the FIP is now creating uncertainty and confusion for a group of utilities that manages 20 percent of all the biosolids generated in this country."

An EPA spokeswoman says that the agency is working toward finalizing the FIP before the March 2016 compliance date, and the plan "will implement the emission guidelines for [SSIs] located in states that do not have an EPA-approved state plan in place."

"The EPA will continue to work closely with states to approve their plans," EPA says, adding that the FIP would apply until a state has an approved plan in place.

NACWA says in its letter that it is "sensitive to the time and resource constraints that your office is under, but our public, city and county members frankly expect a more efficient process from EPA -- especially considering the hundreds of millions of ratepayer dollars that they have been investing to meet these requirements." -- Amanda Palleschi

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News Headline: EPA CRITICS CLAIM MANDATE TO USE MOVES EMISSIONS MODEL JUSTIFIES SUIT |

Outlet Full Name: Inside EPA

News Text: Kansas and other critics of EPA's latest version of its motor vehicle emission simulator (MOVES) issued in 2014 claim that an agency Federal Register notice announcing the air model's availability effectively mandates its use, saying that justifies their suit over the model because the notice is a final agency action subject to judicial review.

The argument, detailed in an Oct. 14 reply brief filed with the U.S. Court of Appeals

for the District of Columbia Circuit, aims to rebut EPA's claim that the suit is flawed because the agency is not requiring use of the model. Kansas and Nebraska, backed by ethanol producers, are urging the court to scrap the model because of their concerns that it overestimates the air pollution caused by ethanol, which could discourage use of the fuel. The brief is available on InsideEPA.com. See page 2 for details. (Doc. ID: 185741)

The suit, *State of Kansas, et al. v. EPA, et al.*, challenges the agency's Oct. 7, 2014, Register notice announcing the release of MOVES2014 -- the latest version of the model -- for use in state implementation plans (SIPs) outlining pollution control measures states will use to meet Clean Air Act requirements (Inside EPA, Aug. 28). The model is also designed for transportation conformity, which aims to ensure that transportation activities will not cause air pollution increases.

EPA claims the notice is not a legally binding document, does not force states to use MOVES and is not a "final agency action" subject to the court's jurisdiction. The agency says that to the extent states could claim injury and legal standing from using the model, through alleged inaccurate estimates of pollution, this could only occur when use of the model is actually relied on in some future regulatory action.

However, Kansas and its allies in their new brief say the Register notice is not a non-binding "policy statement" as EPA claims, but instead is immediately binding and must be used in the context of compliance with the agency's revised, stricter ozone national ambient air quality standard (NAAQS), issued Oct. 1.

The states argue that the notice unfairly forces them to use MOVES2014 in crafting SIPs for complying with the NAAQS of 70 ppb, which is stricter than the previous 2008 standard of 75 ppb. EPA in a fact sheet on the ozone limit said that 213 areas outside of California would likely be classified as not in attainment with the 70 ppb standard based on currently available data, although officials say new data may alter this number. California uses its own vehicle emissions model.

"The challenged Official Release of the MOVES2014 model compels States like Kansas and Nebraska that are in nonattainment with the new Ozone NAAQS to use the model in developing their SIPs, and the Administrator had proposed the NAAQS ten days before the States filed their petition," Kansas says in its new brief. "By contrast, EPA's conjecture that EPA might voluntarily fix the model's problems or approve an alternative model before the States' nonattainment areas are designated is pure speculation, and does not defeat standing."

Final briefs in the case are due Oct. 28. -- Stuart Parker

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News Headline: INDUSTRIES OUTLINE EARLY LEGAL CONCERNS OVER

EPA 'CONSISTENCY' PROPOSAL |

Outlet Full Name: Inside EPA

News Text: Groups representing the energy, chemical and other major industries are outlining early legal concerns over EPA's proposal to update its "regional consistency" policy on uniform application of agency requirements, saying the agency's plan to exclude adverse court rulings from the policy could create significant confusion for the sectors.

A coalition of 16 industry groups including the American Chemistry Council, American Farm Bureau Federation, American Forest & Paper Association, National Rural Electric Cooperative Association, Chamber of Commerce and others said in an Oct. 5 letter to EPA that the proposed revision would "mark a fundamental change in the way that EPA applies its Regional Consistency regulations to judicial decisions" and that such a change would have a "significant effect" on the groups' members, particularly if they operate in more than one court jurisdiction. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185858)

The Texas Pipeline Association (TPA), in its own Oct. 13 comments on the proposed revision to the policy that the industry group must give it "careful consideration in order to assess the manner and extent to which the proposed changes would affect TPA members, as well as the legal issues presented by EPA's proposal."

EPA took comment through Oct. 19 on the planned revision to the policy, but announced in a notice slated for publication in the Oct. 22 Federal Register that it will reopen the public comment period through Nov. 3. The proposal would allow EPA to exclude adverse appellate court rulings on its Clean Air Act policies from applying nationwide, which could mean different agency regional offices imposing differing requirements on industries.

The proposal released in August responds to a U.S. Court of Appeals for the District of Columbia Circuit decision in May 2014 in National Environmental Development Association's Clean Air Project v. EPA, which vacated an EPA memo that sought to narrow the reach of an adverse 6th Circuit air permitting ruling to only the states in that circuit. The D.C. Circuit said the memo was at odds with the regional consistency policy as it would have led to differing permit requirements among all 50 states -- prompting EPA to now seek exemptions to the policy.

Under the Aug. 5 proposed rule EPA would not apply rulings by other circuit courts on locally or regionally applicable regulations -- such as the agency's regional offices' approvals of state implementation plans for complying with air standards, or Clean Air Act permitting decisions -- to states in other appellate circuits, even though this may result in inconsistent policy application and uneven application of the air law (Inside EPA, Aug. 21).

One legal source previously said the proposal would give each of the 10 regions

"wide latitude" to fashion policy absent concurrence from agency Headquarters, saying the language was concerning from an enforcement perspective because "uniformity, even-handedness, and fairness are of paramount importance."

The coalition of 16 industry groups urged EPA to extend the comment deadline for the proposal, saying it needed for time to assess the plan. They asked for a 30-day comment deadline extension saying they are facing significant resource constraints in responding to myriad proposals floated recently by EPA, including its climate utility rules and proposed rule that would set first time methane emissions standards for the oil and gas industry.

"The Associations believe an extension is necessary due to the significance of the proposed rule and its ramifications, as well as the ongoing schedule of comment deadlines for a large number of other proposed rules that EPA has recently issued with overlapping comment periods," the groups say in their letter.

Similarly, TPA in its comments also urged the agency to extend the comment deadline by 60 days, saying the group was also assessing EPA's final Clean Water Act jurisdiction rule, its newly adopted ambient air standard for ozone, the methane proposal and other policies. The group sought a 60-day extension.

EPA in its pending Register notice says that, "After considering the request received from 16 trade and business organizations to extend the public comment period, the EPA has decided to reopen the public comment period" to Nov. 3, to ensure the public has additional time to review the proposed changes to the policy.

EPA acknowledges in the proposed rule the possible outcome of uneven enforcement by allowing some of its regions to opt against adhering to an adverse court ruling in another region. The plan "would be authorizing a region to act inconsistently with nationwide policy or interpretation to the extent that the region must do so in order to act consistently with a decision issued by a federal court that has direct jurisdiction over the region's action," EPA said.

EPA's proposal would revise its consistency policy to acknowledge exceptions to the uniformity approach, saying that "only decisions of the U.S. Supreme Court and decisions of the D.C. Circuit Court that arise from challenges to 'nationally applicable regulations . . . or final action' would apply uniformly nationwide."

The proposal would also revise the rules to clarify that EPA headquarters would not need to issue new "mechanisms," which could potentially include guidance, to address federal court decisions from challenges to locally or regionally applicable actions, as they would not be deemed to affect states in other circuits.

A third revision proposes to revise the rules to "clarify that EPA regional offices' employees would not need to seek headquarters office concurrence to act inconsistently with national policy or interpretation if such action is required by a

federal court decision arising from challenges to 'locally or regionally applicable' actions." -- Bridget DiCosmo

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News Headline: EPA MOVES TO PROHIBIT MORE HFC REFRIGERANTS AMID INDUSTRY CONCERN |

Outlet Full Name: Inside EPA

News Text: EPA is committing to initiate a rulemaking early next year under its Significant New Alternatives Policy (SNAP) program to ban additional refrigerants with a high global warming potential (GWP), a move made alongside a suite of Obama administration actions to curb hydrofluorocarbons (HFCs) that act as potent greenhouse gases (GHGs).

In an Oct. 15 announcement, the White House also unveiled actions from the Department of Energy (DOE) and the Defense Department (DOD) aimed at research on alternative chemicals and steps to cut federal use of HFCs.

The announcement was paired with a host of private sector commitments and a report from industry representatives on progress made since a September 2014 agreement to cut HFCs between industry and the Obama administration.

Despite the administration's efforts to join with industry on the issue, some industry representatives remain concerned about the speed of administration actions, citing an apparent lack of coordination between EPA and DOE as the two agencies work to reduce HFC emissions and maximize energy efficiency from the sector.

The forthcoming SNAP proposal, which EPA intends to initiate in early 2016, would build upon a July 2 finalized SNAP rule removing several high-GWP HFC refrigerants from a list of approved substances. The announcement comes just days after environmentalists formally petitioned the agency to set a phase-out schedule for a range of HFCs, though the agency did not announce which chemicals it would seek to ban and how quickly. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185720)

David Doniger of the Natural Resources Defense Council praised the move in an Oct. 15 blog post, arguing that the commitments "give a boost to international negotiations early next month in Dubai on phasing down HFCs under the Montreal Protocol."

EPA also issued a new proposed rule aimed at improving the handling of refrigerants in the market, a rule the agency estimates would "further reduce enough HFC emissions in 2025 to equal 7 million metric tons of carbon dioxide," according to a press release.

Doniger said that proposal would "extend to HFCs a set of leak prevention and recycling requirements that now apply to other refrigerants that harm the ozone layer."

Together, the agencies' actions would reduce HFCs by an equivalent of 1 billion metric tons of CO₂ by 2025, White House energy and climate change adviser Dan Utech said at a press event. DOE Secretary Ernest Moniz added that combined action by several countries on HFCs could reduce global warming by about half a degree Celsius, a significant amount given the international goal to limit warming to 2 degrees beyond pre-industrial levels to avoid catastrophic climate-related damage.

EPA Administrator Gina McCarthy said at the event that HFC reductions are particularly important because the chemicals are "up to 10,000 [times more potent] than carbon dioxide. So they're more dangerous for climate change."

She told reporters that if HFCs are not addressed, their use will "escalate tremendously. That's why if we cut this off by building the technologies that can use lower global warming potential chemicals, climate-friendly chemicals, and we make those more efficient so it saves consumers money, that curve will essentially go away at no cost to anybody."

The press event, during which McCarthy, Moniz and Utech spoke with industry representatives about the latest developments in HFC-reducing technologies, followed a discussion with industry where representatives gave one-year progress reports and reaffirmed commitments to HFC reductions.

"The message is not to force reductions, but to encourage those reductions and underpin them with standards when the technologies are available. And we see transitions happening today that make a low-carbon future possible. That's what you're looking at today -- no sacrifice, no need for new sweaters, no need for dim light bulbs," McCarthy said. She added that the demonstrated technologies show that "U.S. companies are creating that future and they will have advantages as they move forward internationally."

Industry representatives emerged from the discussion optimistic, but they also voiced concern about the quick pace at which the Obama administration hopes to phase out HFCs and also increase energy efficiency in the sector.

Representatives of Johnson Controls, a major manufacturer of environmental controls, told InsideEPA/climate that they are seeking a "procedural commitment" from the two agencies that details their coordination efforts.

"When we talk to [the agencies], they tell us they're talking to each other, but we don't have proof that they are, and they still have a very aggressive pace," said William McQuade, director of technology, energy efficiency and the environment at

Johnson Controls. He added that the White House Council on Environmental Quality has not taken many steps on such a commitment.

But McCarthy said agencies have addressed industry concern over the timing of the rulemakings, partially through an in-depth stakeholder engagement process during development of the earlier SNAP rules.

She noted that all the companies at the roundtable reported that they "were able to achieve the reductions that they were seeking in a tighter time frame than they promised. And they all came back to us and said that . . . because we did tremendous outreach with the industry before we proposed anything, we were able to do a phase down in the U.S. that really took advantage of chemicals and technologies that were readily available."

In addition, McCarthy said that industry gave EPA and DOE "high marks" for coordinating their efforts through the SNAP and appliance energy conservation standards programs.

Despite McCarthy's remarks, industry groups have repeatedly raised concern about the lack of coordination between the two agencies, arguing that DOE finalizes appliance efficiency standards without taking into account the refrigerants that EPA is in the process of phasing out.

The critique has surfaced in litigation over at least one DOE standard, for commercial refrigeration equipment. Industry petitioners in *Zero Zone, Inc., Air-Conditioning Heating and Refrigeration Institute (AHRI), et al. v. DOE et al.*, say the 2014 standard should be vacated, in part because they claim DOE failed to consider alternative refrigerants, despite knowing that "the two main refrigerants they were relying on were going to be banned."

In Sept. 30 oral arguments before the U.S. Court of Appeals for the 7th Circuit one industry attorney cited preliminary DOE technology documents from 2010 and 2011 that identify the refrigerant issue and argued that even though there was no official SNAP rulemaking proposal when DOE's standard was finalized, EPA was already working on a draft of its rule.

But McCarthy says the two agencies have learned from industry, "and you will see us continuing to move forward. So people shouldn't worry that we're going to get ahead of them. What they should know is that the companies that are in the leadership position will be valued for that leadership."

Laura Wand, vice president at Johnson Controls, echoed McQuade's comments, saying agencies must show "transparency" in how chemicals are selected to be phased out, and "consistency of the application of that procedure so we can plan."

With an easy-to-understand procedure in place, it would be easier for companies to

manage transitions to new chemicals and new equipment, Wand says. "We're fortunate in that we're a big company that can make investments . . . but not everybody can do that," she said, adding, "If we're struggling with it, imagine all the smaller companies."

McQuade added that industry's "resources are finite" regarding compliance with EPA and DOE rules. "It's one of these things where as they assign timelines, they need to keep in mind that some of the same people are working on all these different products and we can't do it all at once," he said.

Beyond EPA's announcement, DOE and DOD also detailed new efforts to accelerate the phase out of HFCs, including new investment in research to identify lower-GWP alternatives and actions to reduce interagency use of HFCs.

According to the White House, DOD will make available up to \$3 million over three years "to fund competitively-selected [research] projects" to examine the use of low-GWP refrigerants for military applications.

The department also set a goal to update its existing heating, ventilation, and air-conditioning systems in 2016 to require use of lower-GWP refrigerants acceptable under the SNAP program, and also plans to "update refrigeration systems at European commissaries to low-GWP refrigerants by 2022."

DOE will also take efforts to reduce HFC use at its facilities, announcing a Request for Proposal for disposing harmful chemicals like HFCs, as well as research into technologies to recycle those substances.

In addition, Moniz announced a report summarizing results of a DOE-funded study, run by the Oak Ridge National Laboratory, testing the viability of low-GWP alternative refrigerants in hot climates.

"Up to now, there's been a concern that in very hot climates it would be hard to replace the HFCs. I believe we took a big step putting that issue to rest, and that's even before one does the engineering optimization that one sees in products like this," Moniz said.

He added that it is important to transfer the new technologies and innovation to "the Indias of the world" to avoid a "huge global climate change problem." -- Abby Smith

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News Headline: IG SCRUTINY OF EPA RFS HIGHLIGHTS FIGHT OVER PROGRAM'S LIFECYCLE BENEFITS |

Outlet Full Name: Inside EPA

News Text: EPA's Inspector General (IG) is launching an evaluation of whether EPA properly incorporated studies on the lifecycle greenhouse gases (GHG) of fuels blended into the gasoline supply as part of its renewable fuel standard (RFS), highlighting an intensifying debate over the program's lifecycle impacts on climate, land and water.

The fight over whether the RFS is achieving its goals of promoting fuels with lower GHGs than conventional gasoline, and whether its impacts on land use and water quality are acceptable, is growing ahead of EPA's issuance of a final multi-year RFS for 2014 through 2016 (Inside EPA, Sept. 18). The agency is under a Nov. 30 consent decree deadline to release a final version of its June proposal that has drawn attacks from the oil and renewable fuel sectors.

Critics of the RFS argue that under the program's current structure, it encourages environmentally damaging corn-ethanol production at the expense of advanced and cellulosic fuels. Under the RFS, renewable fuels are required to reduce GHG emissions over their lifecycle, with cellulosic fuels assumed to provide greater GHG cuts than corn-based ethanol. However, the GHG characteristics of both types of fuel are contested.

Whatever the EPA IG concludes on the program could boost either its critics or supporters. "This project was developed internally within the [IG] during our annual planning process (late spring/early summer) as a discretionary assignment. It was not mandated or requested by an outside entity," an IG spokesman tells Inside EPA.

The IG in an Oct. 15 memo to acting EPA air chief Janet McCabe and Office of Research & Development Science Advisor Thomas Burke says it is launching an evaluation of the RFS' lifecycle impacts, which is likely to focus heavily on GHG impacts. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185747)

"Our objectives are to determine whether the EPA: 1) complied with the reporting requirements of laws authorizing the (RFS); and 2) updated the lifecycle analysis supporting the RFS with findings from the statutorily mandated National Academy of Sciences [NAS] 2011 study on biofuels, the EPA's 2011 Report to Congress on the Environmental Impacts of Biofuels, as well as any subsequent reports or relevant research on lifecycle impacts of biofuels," writes Patrick Gilbride, director of the IG's Science, Research, and Management Integrity Evaluations division.

The Environmental Working Group (EWG) -- which does not support the RFS in its current form -- in an Oct. 16 blog post says NAS in the 2011 study "confirmed that over its entire life cycle, corn ethanol is dirtier than gasoline, and concluded that the RFS may not actually reduce carbon emissions. The Inspector General will look into whether the EPA's estimates of the carbon emissions of fuels were updated in response to the 2011 study."

The NAS report entitled "Renewable Fuel Standard: Potential Economic and Environmental Effects of U.S. Biofuel Policy" said corn ethanol produced in 2011 in biorefineries using natural gas as a source of process heat "is a higher emitter of GHGs than gasoline," said May 2013 comments from the American Petroleum Institute (API).

"Based on this statement, one can conclude that in absence of the RFS, it is likely that GHG emissions from the transportation sector would have been lower," API said. "Furthermore, NAS concluded that the 'RFS may be an ineffective policy for reducing global GHG emissions because the effect of biofuels on GHG emissions depends on how the biofuels are produced and what land-use or land-cover changes occur in the process'."

API says EPA should revise its lifecycle GHG assessment to better account for uncertainties highlighted by the NAS that could show similar lifecycle emissions between fossil fuels and biofuels -- including technologies and fossil fuel use in biorefineries; baseline volume of ethanol production; and a host of other "key drivers."

The RFS requires that fuel producers blend increasing volumes of renewable fuels into the nation's fuel supply, and is established under two energy laws from 2005 and 2007.

Although the volumes of fuel are set by Congress, EPA has issued waivers to reduce requirements for advanced and cellulosic biofuels, amid shortfalls in the expected volumes of those fuels.

EPA in its June multi-year RFS proposal also floated a plan to curb the overall renewable fuels volume that is currently met mostly by corn-based ethanol to account for the ethanol "blend wall." API has long warned of the blend wall, the point at which no more ethanol can be blended into the fuel supply because of vehicles' limitations in using higher ethanol blends and lack of fueling infrastructure to distribute higher blends.

This move has met with a cautious welcome from the oil industry, which nonetheless opposes EPA's proposal to break through the blend wall in 2016 by requiring increasing amounts of renewable fuels.

EPA's proposal has met with stiff resistance from producers of corn ethanol, but a qualified welcome from some advanced biofuels makers -- and debate over the lifecycle impacts of RFS fuels continues (Inside EPA, Sept. 25).

At an event hosted by the Brookings Institution think tank Oct. 16 in Washington, D.C., prominent experts on the RFS disagreed over the policy's effects on food and fuel prices, and the environment.

For example, researcher Timothy Searchinger, of Princeton University and the World Resources Institute, questioned whether biofuels offer GHG benefits.

Searchinger questioned assumptions about land-use change that underpin many models, including those used by the federal government, to estimate the lifecycle GHGs of biofuels. If biofuels production is in fact leading to deforestation in developing countries, for example, GHGs will be rising as a result. Searchinger cited biodiesel, for which the main global feedstocks are soybeans and palm oil, as the worst offender in this regard.

Biofuel "is a stunningly inefficient" way to use land for energy production, Searchinger said, advocating that solar power would be a much more effective way to generate energy that could then be used for transportation.

Christopher Knittel, an economist with the Massachusetts Institute Of Technology, said that even if commonly-used GHG lifecycle assumptions about biofuels are correct, the RFS is a very inefficient way to reduce GHGs.

A carbon tax across the economy as a whole would achieve the same cuts for less than half the cost, he argued. The cost of full RFS implementation as designed by Congress, with no regard for the blend wall, would be \$90 per ton, more than twice the Obama administration's "social cost of carbon," therefore it is "twice as bad as doing nothing," he said.

He suggested that "maybe it is not all about GHG emissions," and noted the substantial boost to farm incomes that the RFS has produced. He said that if the ultimate goal is to increase production of cellulosic ethanol, the existing RFS does not serve that purpose very well, as it encourages development of corn ethanol more than cellulosic fuels.

Bruce Babcock, an economist with Iowa State University, however, said that most researchers "have not bought into Tim's theory," and are still finding biofuels provide GHG benefits.

Babcock said that the major change in land use brought about by biofuel production is intensification of use, not expansion to previously undisturbed land. There are exceptions, he said, but these are in developing countries such as Indonesia and Malaysia. He further said the RFS to date has had very little impact on either food or fuel prices.

Opponents of the RFS claim it pushes global food prices upward by consuming corn that would otherwise enter the food chain, while advocates say it pushes gasoline prices down, because ethanol is inherently cheaper than gasoline. Babcock saw little evidence for either argument, pointing toward myriad other factors that drive both food and oil prices.

In an Oct. 16 statement, pro-ethanol group Growth Energy Co-Chairman Tom Buis labeled the Brookings panel as "heavily biased," pointing to the oil industry's partial funding of work by both Knittel and Searchinger.

He said, "slapping a new title on this previously discredited research won't change the facts. The design of this panel had one objective -- to drive a policy directed at repealing the Renewable Fuel Standard (RFS) so that the status quo of a 90 percent mandate for petroleum based fuels and the excessive profits that it generates stays in place."

However, the RFS' opponents continue to press the case for repeal or reform of the program, supported by fresh research. In an Oct. 14 10-year review of the RFS, researchers at the University of Tennessee find that, "Corn ethanol has resulted in a number of less favorable environmental outcomes when compared to a scenario in which the traditional transportation fuel market had been left unchanged."

The report recommends that the program be abandoned in favor of an "investment-based" mechanism to promote development of cellulosic biofuels. "We believe it is time to create a new policy initiative that delivers on the original intentions of the RFS. The current RFS design is unsuitable for driving advanced biofuels forward. It rewards production from mature technologies while advanced biofuels require a mechanism that overcomes their capital intensity and technology risk," say the report's authors, Dr. Daniel De La Torre Ugarte and Dr. Burton English.

The report was commissioned by the American Council for Capital Formation, a free-market group, which is also launching a new television advertising campaign in the Washington, D.C., market against the RFS, together with other groups including the National Council of Chain Restaurants. The commercial aims to counter a recently-launched campaign by RFS supporters pushing EPA to restore the RFS fuel volumes to statutory levels.

Meanwhile, chemical giant DuPont is opposing efforts by Sen. Pat Toomey (R-PA) and other GOP lawmakers to scrap the policy or at least drive down corn ethanol mandates. In an Oct. 14 letter to Toomey, senior DuPont executives say, "Cellulosic ethanol is a brand new fuel derived from non-food feedstocks like corn stover and switchgrass. DuPont's cellulosic ethanol reduces greenhouse gas emissions by more than 90% versus gasoline and holds tremendous promise for reducing the environmental footprint for U.S. transportation fuels." -- Stuart Parker

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News Headline: OPEC Nations Plan to Join U.N. Climate Drive | ...

Outlet Full Name: New York Times Online, The

News Text: ...top greenhouse gas emitters yet to submit national strategies for

tackling climate change, say they will do so before a U.N. summit...

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News Headline: Numerous States Will Sue to Stop New Climate Rules |

Outlet Full Name: New York Times, The

News Text: WASHINGTON -- As many as 25 states will join some of the nation's most influential business groups in legal action to block President Obama's climate change regulations when they are formally published Friday, trying to stop his signature environmental policy.

In August, the president announced in a White House ceremony that the Environmental Protection Agency rules had been completed, but they had not yet been published in the government's Federal Register. Within hours of the rules' official publication on Friday, a legal battle will begin, pitting the states against the federal government. It is widely expected to end up before the Supreme Court.

"I predict there will be a very long line of people at the federal courthouse tomorrow morning, eagerly waiting to file their suits on this case," said Jeffrey R. Holmstead, a lawyer for the firm Bracewell & Giuliani who represents several companies that are expected to file such suits.

While the legal brawls could drag on for years, many states and companies, including those that are suing the administration, have also started drafting plans to comply with the rules. That strategy reflects the uncertainty of the ultimate legal outcome -- and also means that many states could be well on the way to implementing Mr. Obama's climate plan by the time the case reaches the Supreme Court.

The E.P.A.'s climate change rules are at the heart of Mr. Obama's ambitious agenda to counter global warming by cutting emissions of planet-warming carbon pollution. If they withstand the legal challenges, the rules could shutter hundreds of polluting, coal-fired power plants and freeze construction of such plants in the future, while leading to a transformation of the nation's power sector from reliance on fossil fuels to wind, solar and nuclear power.

Mr. Obama has also used the rules as leverage in his negotiations to reach a global climate change accord in Paris in December. He hopes to broker a deal committing every country to enacting domestic climate change policies.

The official publication of the rules will also spur legislative pushback on Capitol Hill, where Senator Mitch McConnell of Kentucky, the majority leader, will introduce two resolutions to block them. The legislation will be introduced under the rarely used Congressional Review Act, which allows Congress to block an executive

branch rule within 60 legislative days of its publication.

While the resolutions are likely to pass the Republican-controlled Congress, Mr. Obama would be expected to veto them. But by introducing the resolutions, Mr. McConnell hopes to convey to the world that Congress does not support the Obama regulations -- a message that could be amplified if the Senate votes on the resolutions before or during the Paris summit meeting.

The Obama administration has sought to ensure that the rules will not come under question before that meeting. By delaying the official publication of the rules until nearly three months after they were announced, for example, the administration appeared to be trying to ensure that no major legal decisions to weaken them would be issued before the Paris meeting.

A broad and powerful coalition of governors, attorneys general, coal companies, electric utilities and business groups such as the United States Chamber of Commerce will file suits contending that the rules, put forth under the 1970 Clean Air Act, represent an illegal interpretation of the law. They will also petition to delay implementation of the rule until the case is argued in federal court.

"The president's illegal rule will have devastating impacts on West Virginia families, and families across the country," Attorney General Patrick Morrisey of West Virginia said in a statement. Mr. Morrisey, whose home state's economy is heavily dependent on coal mining, is expected to play a lead role in the multistate lawsuit.

States and companies may be hedging their bets.

In Georgia, Gov. Nathan Deal's administration plans to sue the E.P.A. At the same time, the governor, a Republican, has also instructed his director of environmental protection, Judson H. Turner, to begin crafting a plan to comply with the rules.

"The governor of Georgia said to me, 'Whatever action may be taken on the legal front, we'll need to develop a plan that works for Georgia,' " Mr. Turner said. If Mr. Obama's plan survives the legal challenge, Mr. Turner added, "we'll have the confidence that we'll put a plan for Georgia together that's better than a federal plan."

Similar dynamics are playing out in many other states that are suing over the rules, said Vicki Arroyo, the executive director of the Georgetown University Climate Center, which focuses on state-level climate policies.

"It's really rare to find a state that just says, 'Hell no,' " she said.

The rules assign each state a target for reducing its carbon pollution from power plants, but allows states to create their own custom plans for doing so. That rule is designed to encourage states to make major changes in their electric power sectors -- for example, to shut down coal-fired power plants and replace them with wind and

solar power. It is also designed to encourage states to enact so-called cap-and-trade systems, under which they would place a cap on carbon emissions and create a market for buying and selling pollution credits.

States have to submit an initial version of their plans by 2016 and final versions by 2018. States that refuse to submit a plan will be forced to comply with one developed by the federal government.

Republican governors have denounced the rule, particularly its emphasis on pushing cap-and-trade systems; in his first term, Mr. Obama tried but failed to send a cap-and-trade bill through Congress. Since then, the term has become politically toxic: Republicans have attacked the idea as "cap-and-tax." The governors of five states -- Texas, Indiana, Wisconsin, Louisiana and Oklahoma -- have threatened to refuse to submit a plan of any kind.

But economists and many industry leaders have found that in many cases, the easiest and cheapest way for states to comply would be by adopting cap-and-trade systems.

American Electric Power, an electric utility that operates in 11 states, is among the companies that intends to sue the administration over the rule. At the same time, the company's vice president, John McManus, said: "We think it makes sense for states to at least start developing a plan. The alternative of having a federal plan has risks." And he said that his company could support a cap-and-trade plan. "The initial read is that a market-based approach is more workable," he said.

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News Headline: Massachusetts leads nation in energy efficiency for 5th straight year, scorecard finds |

Outlet Full Name: Republican Online

News Text: ...For the fifth-straight year Massachusetts was named the national leader in energy efficiency, earning 44 out of a possible 50 points...

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News Headline: EPA mine spill was preventable, points to broader problem | ..

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News Headline: Key events leading up to massive Colorado mine waste spill |

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News Headline: APNewsBreak: EPA mine spill could have been prevented |

Outlet Full Name: Advocate Online, The

News Text: ...1of/2 Caption Close Image 1 of 2 Steve Way, on-scene coordinator for the EPA, stands in front of the new facility on Thursday, Oct. 15,...

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News Headline: Probe finds EPA error caused mine spill it hoped to avoid |

Outlet Full Name: Advocate Online, The

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News Headline: Univ. of New Mexico to study exposure to mines' metal mixes |

Outlet Full Name: Associated Press

News Text: ALBUQUERQUE, N.M. (AP) - The University of New Mexico will use federal funding to study Native American communities' exposure to metal mixtures from abandoned mine sites awaiting cleanup, such as one in Colorado where there recently was a massive spill of wastewater.

The university said Thursday the \$3.5 million grant was awarded to the College of Pharmacy by the National Institute for Environmental Health Sciences and the National Institute on Minority Health and Health Disparities.

The university said the funding will pay for research as well as providing training and community environmental health workshops in collaboration with tribal colleges across the West.

There are thousands of abandoned and unremediated hard rock mines. Those mines are receiving increased scrutiny since the August accidental release of wastewater from the Gold King Mine near Silverton, Colorado.

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News Headline: EPA mine spill was preventable, points to broader problem |

Outlet Full Name: Associated Press

News Text: BILLINGS, Mont. (AP) - Investigators are blaming the U.S. Environmental Protection Agency for a 3 million-gallon wastewater spill from a Colorado gold mine, saying an agency cleanup crew rushed its work, failed to consider the complex engineering involved and ended up triggering the very blowout it hoped to avoid.

Members of Congress seized on the results of the two-month Interior Department investigation to slam EPA's handling of a spill that fouled rivers in three states.

The Aug. 5 accident has revived a long-simmering debate over the unresolved fate of hundreds of thousands of abandoned mines across the U.S, offering ammunition to both sides.

Whereas Republicans, including U.S. Sen. Cory Gardner of Colorado, focused their ire solely on the EPA, U.S. Sen. Michael Bennet, also of Colorado and a Democrat, coupled his criticism of the agency with a call for reforms that could speed mine cleanups.

The Colorado spill would have been avoided had the EPA team checked on water levels inside the inactive Gold King Mine before digging into its collapsed and leaking entrance, a team of engineers from Interior's Bureau of Reclamation concluded in a 132-page report released Thursday.

Abandoned hard-rock underground mines are not subject to the same federal and state safety requirements other mining operations must follow, and "experience indicates that they should be," the report concluded.

"A collapsed flooded mine is in effect a dam, and failure must be prevented by routine monitoring, maintenance, and in some cases remediation," the engineers wrote. "However, there appears to be a general absence of knowledge of the risks associated with these facilities."

The findings have implications across the United States: Similar disasters could lurk among the many abandoned mines that have yet to be cleaned up.

The total cost of containing this mining industry mess could top \$50 billion, according to government estimates.

The root causes of the Colorado accident trace back decades, when mining companies altered the flow of underground water through a series of interconnected tunnels in the extensively mined Upper Animas River watershed, the report said.

EPA documents show its officials knew of the potential for a major blowout from Gold King, located north of Silverton, Colorado as early as June 2014. After the spill, EPA officials described the blowout as "likely inevitable" because millions of gallons of pressurized water had been bottling up inside the mine.

The Interior report directly refuted that assertion. It said the cleanup team could have used a drill rig to bore into the mine tunnel from above and safely gauge the danger of a blowout.

Instead, the EPA crew, with the agreement of Colorado mining officials, assumed the mine was only partially inundated.

"This error resulted in development of a plan to open the mine in a manner that appeared to guard against blowout, but instead led directly to the failure," the Bureau of Reclamation engineers wrote.

EPA spokeswoman Nancy Grantham said the agency did not use a drill rig to bore into the mine because of difficult conditions at the site high in the San Juan Mountains. An internal EPA review "identified technical challenges, safety, timing, and cost as factors in considering this technique," she said.

EPA officials pointed out that Gold King's entrance already was leaking and could have eventually blown out anyway. The Interior report acknowledged that was possible.

The blowout tainted rivers in Colorado, Utah, New Mexico - and on the Navajo Nation - with dangerous heavy metals including arsenic and lead. It temporarily shut down drinking water supplies and cropland irrigation.

On Thursday, Navajo President Russell Begaye said the Obama administration had denied a request for an emergency declaration for the tribe over economic damage caused by the spill.

Begaye said the Interior report exposed the EPA's "gross negligence" and repeated his call for federal assistance.

The Interior report stopped short of assigning fault to any individuals, despite prior claims from EPA Administrator Gina McCarthy that it would determine fault and any negligence.

U.S. Rep. Scott Tipton, a Republican whose district includes the Gold King, called the report disturbing in part because it revealed the EPA lacked the technical expertise to address the complexity of the mine. "Obviously a glaring weakness," Tipton said.

With abandoned coal mines, monitoring and cleanups are funded in part by a fee companies pay. No such arrangements exist for inoperative hard-rock mines, and that's a national problem, the report noted.

Given industry opposition to efforts to hold mine owners accountable, the cleanup on hard-rock mines such as Gold King has been left to a scattering of federal and state agencies, without common standards or even lists of the most problematic mines.

Elliott reported from Denver.

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News Headline: Key events leading up to massive Colorado mine waste spill |

Outlet Full Name: Associated Press

News Text: A U.S. Interior Department investigation released Thursday said the Environmental Protection Agency could have prevented a 3-million-gallon wastewater spill from a Colorado mine in August. The Bureau of Reclamation, which is part of Interior, provided this timeline of events concerning the cleanup of the long-inactive Gold King Mine in southwest Colorado:

2009: Concerned that a cave-in was holding back water inside the mine that might someday burst out, Colorado tries pushing a pipe through the debris to relieve the pressure.

2014: The state asks the EPA to reopen and stabilize the mine entrance because erosion from the hillside above has covered the pipe.

Sept. 11, 2014: The EPA starts excavating the mine opening, but it stops because water begins to seep out, and a nearby holding pond might not be big enough. With winter approaching, work is halted until 2015.

July 14, 2015: The EPA returns to the site.

About July 23: The EPA's on-scene coordinator asks a Bureau of Reclamation official to visit the mine because the coordinator is unsure about plans to drain water. The visit is scheduled for Aug. 14 because the EPA official is going on vacation.

Aug. 5: A different EPA on-scene coordinator, filling in for the one on vacation, is at the site. EPA and state officials agree to insert a pipe downward through the debris covering the mine opening to reach water inside and begin pumping it out. About 11 a.m., water begins spurting through the debris and then becomes a torrent. Eventually, 3 million gallons escape.

Aug. 24: An EPA internal review concludes the blowout "was likely inevitable."

Oct. 22: The Bureau of Reclamation report says the EPA underestimated how much water was inside the mine. The report said the blowout could have been avoided if the EPA had drilled into the mine from above, measured how much water was inside and then revised its plan accordingly.

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News Headline: Interior finds EPA caused mine spill it hoped to avoid | ..

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News Headline: Probe finds EPA error caused mine spill it hoped to avoid | ..

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News Headline: EPA blamed for spill at Colo. mine |

Outlet Full Name: Boston Globe, The

News Text: BILLINGS, Mont. — Government investigators squarely blamed the US Environmental Protection Agency Thursday for a 3 million-gallon wastewater spill from a Colorado gold mine, saying an EPA cleanup crew rushed its work and failed to consider the complex engineering involved, triggering the very blowout it hoped to avoid.

The spill that fouled rivers in three states would have been avoided had the EPA team checked on water levels in the Gold King Mine before digging into a collapsed mine entrance, Interior Department investigators concluded.

The technical report on the causes of the Aug. 5 spill has implications across the United States, where similar disasters could lurk among the hundreds of thousands of abandoned mines that have yet to be cleaned up. Some estimates put the total cost of containing the mining industry mess at more than \$50 billion.

Associated Press

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News Headline: Interior finds EPA caused mine spill it hoped to avoid | .

Outlet Full Name: Boston Herald Online

News Text: BILLINGS, Mont. — Government investigators squarely blamed the U.S. Environmental Protection Agency Thursday for a 3 million...

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News Headline: EPA gold mine spill could have been prevented, investigators conclude | .

Outlet Full Name: Hartford Courant Online

News Text: Government investigators squarely blamed the U.S. Environmental Protection Agency Thursday for a 3 million gallon...

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News Headline: EPA Mine Spill Could Have Been Prevented |

Outlet Full Name: New York Times Online, The

News Text: BILLINGS, Mont. — Government investigators squarely blame the U.S. Environmental Protection Agency for a 3 million gallon...

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News Headline: Mill leaked cooling water into river ; DEP says the wastewater from the Catalyst Mill in Rumford contained paper fiber but not chemicals. |

Outlet Full Name: Portland Press Herald

News Text: There was a spill from the paper mill in Rumford into the Androscoggin River.

The Catalyst Mill in Rumford accidentally discharged 15,600 gallons of cooling water contaminated with paper fiber into the Androscoggin River on Thursday afternoon, a mill spokesman said.

The Maine Department of Environmental Protection said "thermal seal water," which is used in the paper-making process, leaked into the river.

"The department investigated the occurrence and spoke with mill representatives who tested the wastewater and confirmed it was essentially hot water with paper fiber," DEP spokesman David Madorem said. "Based on current information, this incident did not require a response from DEP to be onsite; however, we are in contact with the Catalyst paper mill and will continue to monitor the situation."

The DEP statement did not say whether there was any threat to the river, although mill spokesman Tony Lyons said it posed no threat to wildlife or the public.

There were early reports of up to 57,000 gallons of contaminated water being dumped in the river. When the system malfunctioned at about 2:30 p.m., the mill was required to notify local fire departments and the state, which happened before mill operators completely understood the extent of the discharge.

The mill is allowed to discharge water that has not had contact with paper manufacturing, but is used for cooling, he said. The sewers that collect that cooling water have a turbidity meter that determines whether there are paper fibers in the water. That meter malfunctioned, so instead of diverting the water to a holding tank because of the paper fiber, it instead released it into the river, he said.

"Paper fiber was the only material in the water. It was not a chemical spill," Lyons said. He said the water had no contact with chemicals used in the papermaking

process.

"We contacted the DEP and the commissioner's office. ... They consider it a non-emergency event." It is, however, a violation of the mill's discharge permit with the DEP.

The mill will probably have to clean up the paper fiber that settled in a retention pond at the discharge site, from which point it passes over some rocks and into the river, he said. It was unclear whether the mill would be fined.

The Catalyst Mill makes coated paper used in magazines and food and beverage packaging. The mill employs 800 people, according to its website. David Hench can be contacted at 791-6327 or at: dhench@pressherald.com

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News Headline: EPA gets blame for mine spill into rivers |

Outlet Full Name: Washington Post, The

News Text: BILLINGS, Mont. - Government investigators blamed the Environmental Protection Agency on Thursday for a 3 million-gallon wastewater spill from a Colorado gold mine, saying an EPA cleanup crew rushed its work and failed to consider the complex engineering involved, triggering the very blowout it hoped to avoid.

The spill that fouled rivers in three states would have been avoided if the EPA team had checked on water levels inside the Gold King Mine before digging into a collapsed and leaking entrance, Interior Department investigators concluded.

The technical report on the causes of the Aug. 5 spill has implications across the United States, where similar disasters could lurk in an estimated hundreds of thousands of abandoned mines that have not been cleaned up. The cost of containing this mining-industry mess could top \$50 billion, according to government estimates.

The root causes of the Colorado accident began decades ago, when mining companies altered the flow of water through a series of interconnected tunnels in the extensively mined Upper Animas River watershed, the report says.

EPA documents show that its officials knew of the potential for a major blowout from the Gold King Mine near Silverton as early as June 2014. After the spill, EPA officials described the blowout as "likely inevitable" because millions of gallons of pressurized water had been bottling up inside the mine.

The Interior Department's report rebuts that assertion. It says the cleanup team could have used a drill rig to bore into the mine tunnel from above, safely gauging the

danger of a blowout and planning the excavation accordingly. Instead, the EPA crew - with the agreement of Colorado mining officials - assumed the mine was only partially inundated.

"This error resulted in development of a plan to open the mine in a manner that appeared to guard against blowout, but instead led directly to the failure," said engineers from the Interior Department's Bureau of Reclamation, who spent two months evaluating the accident.

The blowout tainted rivers in Colorado, Utah, New Mexico and on the Navajo Nation with dangerous heavy metals, including lead and arsenic, temporarily shutting down drinking water supplies and cropland irrigation.

The report stops short of assigning fault to any individuals.

EPA spokeswoman Nancy Grantham said the report "will help inform EPA's ongoing efforts to work safely and effectively at mine sites as we carry out our mission to protect human health and the environment."

- Associated Press

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News Headline: EPA and partners release new blueprint to protect and restore Long Island Sound |

Outlet Full Name: Hersam Acorn Newspapers - Shelton

News Text: ... Among these goals are: a reduced number of beach closures due to sewage pollution; a reduced area of the Sound with unhealthy oxygen...

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News Headline: Climate change affects us all, even in New Hampshire | ..

Outlet Full Name: Keene Sentinel Online

News Text: ...Whitley | Posted: Thursday, October 22, 2015 12:00 pm The enormity of climate change can seem overwhelming and even abstract. When...

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News Headline: Paris Climate Summit Will Hinge on Climate Aid-Poor Nations |

Outlet Full Name: New York Times Online, The

News Text: More funds to help poor nations cope with climate change will be the make-or-break issue when a Paris summit seeks a U.N. deal in...

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News Headline: Connecticut again near top on energy efficiency | .

Outlet Full Name: Advocate Online, The

News Text: ...Conn., among the first in Connecticut to install solar power and other energy efficiency measures as part of an incentive program...

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News Headline: 'Green' school named after late NYC education official |

Outlet Full Name: Advocate Online, The

News Text: ...on Thursday to dedicate the Kathleen Grimm School of Leadership and Sustainability at Sandy Ground, or Public School 62, on Staten Island....

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News Headline: Connecticut again near top on energy efficiency | .

Outlet Full Name: Greenwich Time Online

News Text: ...Conn., among the first in Connecticut to install solar power and other energy efficiency measures as part of an incentive program...

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News Headline: UDALL 'OPTIMISTIC' ON POSSIBLE LWCF DEAL TO ALLOW VOTE ON TSCA REFORM |

Outlet Full Name: Inside EPA

News Text: Sen. Tom Udall (D-NM), a lead co-sponsor of legislation to overhaul the Toxic Substances Control Act (TSCA), says he is "optimistic" on reaching a deal with senators to resolve a dispute over reauthorizing the Land and Water Conservation Fund (LWCF) that has led to an indefinite delay of a Senate floor vote on the TSCA bill.

"Conversations about the path forward for both TSCA and LWCF continue, and Senator Udall remains optimistic that an agreement will emerge," a spokeswoman for Udall's office tells Inside EPA Oct. 19.

Udall, who introduced the TSCA bill with Sen. David Vitter (R-LA), earlier this month said he would try to craft an agreement with Sens. Richard Burr (R-NC) and Kelly Ayotte (R-NH) who are pushing for reauthorizing the LWCF, which expired Sept. 30. Burr and Ayotte had floated the possibility of trying to attach a reauthorization measure to the TSCA reform bill, which led to senators holding off on a planned floor vote on the reform bill.

Ayotte and Burr are both supporters of the TSCA reform legislation, S. 697, but their push on the LWCF has created major uncertainty about when the Senate might try to hold votes on any of the measures.

Udall has said he supports Burr and Ayotte in pushing a stand-alone bill to reauthorize the LWCF, and is trying to reach a deal with the senators through which they would drop the planned TSCA bill amendment in exchange for Udall helping to promote support for the stand-alone LWCF bill.

A spokesperson for Burr's office declined to give an update on the negotiations over the LWCF, a fund that helps acquire and maintain park lands and is funded by companies drilling offshore for oil and gas.

Politico has reported that a TSCA bill amendment on the LWCF could face opposition from a handful of senators, including Republicans Ted Cruz (TX) and Mike Lee (UT), leading to neither the rider nor the bill getting a vote. While the TSCA bill currently has at least 60 declared supporters -- enough to overcome a potential filibuster threat from Sen. Barbara Boxer, who opposes the bill's state preemption and other provisions -- attaching the LWCF measure could cause a loss of support that cuts S. 697's support to under the 60-vote filibuster threshold.

Ayotte and Sen. Maria Cantwell (D-WA) both attempted during Senate floor action Oct. 8 to advance the standalone LWCF reauthorization bill, calling for unanimous consent of its passage. Both efforts were quickly stifled with Sens. Lee and James Lankford (R-OK) objecting, and the timetable for future action is unclear.

In floor remarks Oct. 6, supporters of the TSCA reform legislation urged Ayotte and Burr -- both co-sponsors of S. 697 -- to find another avenue for reauthorizing the LWCF. For example, Vitter said, "I urge all of us to come together, now, and get this done. In the Senate these opportunities don't come a dime a dozen. . . . The only issue is Senator Burr and Senator Ayotte, and their desire to have a vote on a completely different piece of legislation. But we have an agreement to move forward in two hours and we need to do that."

Senators finished their most recent session Oct. 8 without holding a vote on S. 697, and Oct. 19 reconvened with consideration of a "sanctuary cities" bill, S. 2146, unrelated to TSCA reform. At press time, Oct. 21, the Senate was considering S. 754, a cybersecurity bill.

Adding to complications on advancing the TSCA bill, Democrats blocked energy and water appropriations legislation, H.R. 2028, from proceeding before the Columbus Day break.

The 49-47 vote to prevent cloture drew the ire of Sen. Lamar Alexander (R-TN), chair of the Appropriations Committee's energy and water panel, who called it "a very bad precedent and it really insults the Senate."

Even if senators can resolve the impasse over unrelated legislation such as the LWCF, they might still have to address some lingering concerns about the bill from advocates and states.

The Natural Resources Defense Council (NRDC) has said that the revised bill does not address its fears about language that could weaken EPA's significant new use rule power to identify chemicals of concern.

In addition, the Environmental Council of the States and the National Conference of State Legislatures (NCSL) -- two groups representing state officials -- in a recent letter to the top Republican and Democratic members of the Senate say they welcome the push for TSCA reform but add that changes to the bill are necessary. For example, the groups call for softer preemption of state chemicals programs and other updates.

The two states groups urge the senators to ensure that the final TSCA measure limits preemption of state chemicals programs; permits states to regulate chemicals during the period when states seek a waiver to regulate chemicals that have been assessed by EPA; and address concerns about how to ensure that EPA has the necessary funding and other resources "to fully implement this legislation" should it become law. -- Bridget DiCosmo

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News Headline: Groton Wind meets all state permitting requirements | ..

Outlet Full Name: New Hampshire Union Leader Online

News Text: ...and caring community partners across the U.S. where we operate nearly 60 renewable energy projects. We look forward to continuing to...

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News Headline: MICHIGAN WATER CRISIS HIGHLIGHTS CALL FOR UPDATED LEAD DRINKING WATER RULE | ..

Outlet Full Name: Inside EPA

News Text: A recent drinking water crisis in Flint, MI, where the city experienced elevated levels of lead in drinking water after switching water sources, highlights a call from EPA advisors to include new monitoring and notification requirements in a revised lead and copper drinking water rule.

The final draft recommendations from the National Drinking Water Advisory Council's (NDWAC) Lead and Copper Rule (LCR) Working Group include new monitoring requirements aimed at making sure corrosion control treatment (CCT) to mitigate the risks of lead leaching from service lines is effective, as well as a new "household action level" for notifying state and local agencies of troublesome lead sampling results. The report is available on InsideEPA.com. See page 2 for details. (Doc. ID: 185679)

The full NDWAC will review the recommendations at a Nov. 17-19 meeting in Washington, D.C.

Specifically, the work group calls on EPA to release a revised CCT guidance manual as soon as possible and update this manual every six years, so that public water systems and state drinking water agencies can take advantage of improvements in the science. Additionally, the report recommends EPA provide increased expert assistance on CCT to water systems and state agencies, continue to require re-evaluation of CCT when a water system makes a change in treatment or source water, and continue to require water quality parameter (WQP) monitoring to ensure the CCT is achieving the treatment objectives. The work group, however, also says EPA should consider requiring such monitoring on a more frequent basis with additional guidance on process control methods.

For large water systems, "regularly revised guidance would help states and systems stay current with corrosion control science as they respond to problem situations, but more importantly help them anticipate challenges as new water sources and treatments are brought on line, or they contemplate further refinement to corrosion control," the report says. "Small and medium sized systems should work with their primacy agency to determine whether updates to CCT guidance is applicable to them."

EPA is currently sending a "task force" to offer technical assistance to Flint after citizen groups in the town asked the agency to invoke "emergency" authority to reduce high levels of lead and other contaminants in the city's drinking water system that occurred when Flint switched its water supply source from Detroit's municipal system to the Flint River. The groups say the river water is more corrosive, causing more lead to leach into the water supply.

Monitoring results from June showed that lead levels had increased to 11 micrograms per liter (ug/L) compared to 6 ug/L in 2014. This is still below the LCR lead action level of 15 ug/L, which triggers requirements for water systems to reduce

water corrosion and, if that is not enough, to replace lead service lines under their control.

Experts interviewed by the Detroit Free Press say that certain kinds of CCT testing would have predicted the elevated lead levels, although the tests are specialized and not required by EPA.

Although not directly addressing the situation in Flint, the work group's recommendations call for a "more robust water quality parameter (WQP) monitoring program to improve process controls for CCT" as well as "voluntary customer initiated tap water sampling coupled with a more robust and targeted public education program to encourage sampling, in part to provide direct information to consumers that they can use to reduce potential exposures to lead from drinking water in their home and to provide ongoing information to the [public water system] to identify and correct unanticipated problems."

The panel adds that the more robust WQP program should include more frequent monitoring than what is currently required; tailor plans to the individual CCT plans and have EPA review them; revisit the program "based on the advancing science as documented in research reports . . . and EPA manuals," and use a "more rigorous data review process such as control charting and similar process control techniques" from the current program.

Currently, water systems prioritize certain residences within their distribution systems for sampling when they are known to be "at a high-risk of elevated lead and/or copper in the water," but selection of these elevated sites "enables a smaller number of sample sites than random or geographic site selection procedures," the work group says.

It can be challenging to recruit customers willing to take in-home samples, and inconsistent sampling protocols by customers can produce varying sampling results, the work group says. Additionally, research "has shown that sampling results may vary, and not necessarily consistently, based on the configuration and length of lines from the water main to the sampling tap and whether the sample is a first draw or a subsequent sample intended to reflect water that had been in a [lead service line] for some time," the report says. -- Amanda Palleschi

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News Headline: SAB MEMBERS SEE LIMITATIONS IN EPA FRACKING STUDY AHEAD OF PEER REVIEW |

Outlet Full Name: Inside EPA

News Text: Members of an EPA Science Advisory Board (SAB) panel are highlighting limitations in the agency's landmark draft study of hydraulic fracturing's

potential drinking water impacts, including its lack of "prospective" baseline studies, that might hint at recommendations they could make on how to improve the analysis.

The draft report released in June is not intended to be a quantitative risk assessment, but instead identifies mechanisms by which fracking could potentially impact drinking water. The study found no "widespread" impacts to drinking water supplies from fracking but identified some potential "vulnerabilities" to water.

The draft conclusions are being cited by industry and environmentalists separately to bolster their competing calls over regulating fracking.

EPA however has cautioned that its draft assessment should not be used to drive policy decisions because it contains a number of data limitations that hindered the ability to make national conclusions about some of the state-specific findings -- potentially undermining its industry claims to cite the study bolsters their calls against further regulation of fracking, or environmentalists' argument that the study shows the need for controls.

For example, on chemical mixing, EPA found that the frequency of on-site spills from hydraulic fracturing activities could be estimated for two states, Colorado and Pennsylvania, from approximately 0.4 to 12.2 spills per 100 wells, but not nationally due to data availability.

But the SAB panelists, ahead of an Oct. 28-30 scheduled peer review to be held in Washington, D.C., are highlighting some other concerns about the study's limits, which could ultimately prompt the panel to provide recommendations for future studies to address the issues.

For example, in individual comments filed ahead of the peer review, Daniel Goode, of U.S. Geological Survey, writes, EPA's data on the relationship between quantities of water use and fracking is "highly informative," but limited by the "lack of information on water use and availability at the local or site scale," which EPA notes in the draft report. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185864)

"This limitation could have possibly been addressed by EPA data collection and monitoring at sites of existing [fracking] water use, possibly as part of prospective studies that were in the study plan, but which were not conducted," according to Goode's written comments.

EPA planned to include "prospective" studies at drill sites that were just being developed, allowing researchers to track changes in the water quality near the site as drilling progressed and thus accumulate valuable "baseline" data, but those were hindered by setbacks, including difficulties identifying appropriate sites and a failure to reach legal agreements with operators.

"Such studies would allow EPA to monitor water acquisition and the effects of such acquisition to a level of detail not practiced by industry or required by state regulation," Goode writes, calling the absence of the studies a "major limitation" of the draft report. "These detailed new data would allow EPA to reduce current uncertainties and research gaps about the relation between" fracking and drinking water.

Joseph DeGeorge, of Merck Research Laboratories, raised similar concerns in his comments. "The data from these case studies could have dramatically reduced the uncertainties carried forward in many aspects of the assessment and the absence of these studies is a significant loss for the assessment," DeGeorge writes.

The draft report examined findings across five phases of the fracking-water lifecycle for potential impacts: water acquisition, chemical mixing, well injections, flowback and produced water, and wastewater management.

Congress in an appropriations law required EPA to conduct the draft analysis. EPA in the study says that it did not find evidence that the mechanisms by which fracking could potentially impact drinking water have "led to widespread, systemic impacts" in the United States. Those mechanisms include water withdrawals in areas of low water availability; spills of fracking fluids and wastewater; fracking directly into underground sources of drinking water; underground migration of liquids and gases; and inadequate wastewater management.

During a Sept. 30 teleconference to review the charge questions ahead of the peer review, the panelists sought to clarify the scope of its review, including the extent to which the panel should consider the lack of quantitative data on the frequency and severity of impacts in the study.

"It's not clear to me how we assess how clearly" those factors were identified in the draft report given that it lacks specific quantification of the frequency and severity of impacts related to fracking and drinking water resources, panel member Peter Bloomfield, of North Carolina State University, said during the call.

The individual comments reflect some of those concerns. For example, James Saiers, of Yale University, notes in the written comments that the "usefulness and overall impact of the report could be increased through recommendations of steps that could be taken to mitigate the limitations and reduce the uncertainties." Such recommendations could address monitoring programs, data reporting and accessibility, and areas of high-priority research, Saiers writes.

Cass Miller, of University of North Carolina, writes that while EPA properly articulated the data limitations throughout the draft analysis, "Assessing the potential for environmental contamination of drinking water resources would require much more data than is currently available."

Miller suggests that EPA quantify, to the extent possible, the fraction of sites using best practices for preventing contamination from chemical mixing, and emphasize "stronger support for the development and use of fracking additives that pose a lower risk to the environment." -- Bridget DiCosmo

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News Headline: Study Faults E.P.A. for Toxic Wastewater Spill in Colorado Rockies |

Outlet Full Name: New York Times, The

News Text: The Environmental Protection Agency, which accidentally spilled three million gallons of toxic wastewater from an abandoned mine in Colorado, lacks the technical skills to handle such tricky projects, a government assessment reported on Thursday. The big accident could have been averted if the agency had had greater expertise and acted more prudently, the report said.

The E.P.A. had intended to gradually drain and capture contaminated water that was seeping out of the Gold King Mine and poisoning local streams in the area, which is high in the Rocky Mountains in the southwestern part of the state. Instead, on Aug. 5, workers caused a blowout, releasing a yellow-red torrent into Cement Creek and then into the Animas River. The agency has conceded that its people underestimated the volume of water collected in the mine and how much pressure it was under. It requested a separate inquiry by the Interior Department, which released its 132-page report by a team of engineers on Thursday.

At the E.P.A., the report said, "abandoned mine guidelines and manuals provide detailed guidance on environmental sampling, waste characterization and water treatment, with little appreciation for the engineering complexity of some abandoned mine projects that often require, but do not receive, a significant level of expertise."

In particular, it said, the E.P.A. does not adequately "analyze the geologic and hydrologic conditions of the general area" or comprehend how, in a region honeycombed with tunnels, changing conditions in one affect the others.

The E.P.A. said it was reviewing the report and offered no immediate response to the specifics in it.

The accident occurred in a remote area, at an elevation of 11,500 feet, where a mine entrance had been plugged with rocks and soil that held back the water. The E.P.A., working with the state Department of Natural Resources, pushed a pipe horizontally through the top of the plug, expecting to find a pocket of air. Instead, water began to gush out.

The better approach, the Interior Department's engineers concluded, would have

been to drill a hole from above first to gauge conditions and, if necessary, relieve pressure. In its own review, in August, the E.P.A. argued that a drilling operation would have been too costly and slow. It concluded that the plug would have collapsed eventually, and that a "blowout was likely inevitable." The Interior Department acknowledged that the plug "may have failed on its own," but said smarter intervention could have averted that.

The mountains in the region have veins of gold and silver, but also lead, copper and zinc. Mining operations can accelerate the leaching of metals from the soil, add other toxins and create especially concentrated pools of poisoned water. Contaminated water continually seeps from mines into nearby streams, and environmental regulators have tried to slow or stop that process.

But instead of fixing the problem at Gold King, the E.P.A. temporarily made it much worse, incurring the wrath of residents downstream.

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News Headline: Environmental center to open in Accokeek |

Outlet Full Name: Associated Press

News Text: ACCOKEEK, Md. (AP) - A new environmental education center is opening in Accokeek.

Sen. Ben Cardin is scheduled to join students for the opening on Friday.

The center will enable the Alice Ferguson Foundation to expand hands-on learning initiatives offered on the 330-acre Hard Bargain Farm.

The foundation works to promote environmental sustainability of the Potomac River watershed.

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News Headline: EPA URGES DISTRICT COURTS TO HALT CWA RULE SUITS PENDING 6TH CIRCUIT RULING |

Outlet Full Name: Inside EPA

News Text: EPA is urging federal district courts to halt a slew of lawsuits over the agency's Clean Water Act (CWA) jurisdiction rule until the U.S. Court of Appeals for the 6th Circuit decides whether it has authority to hear appellate challenges to the rule, because if the 6th Circuit hears the case, then EPA will seek to dismiss the lower court lawsuits.

The Department of Justice (DOJ) on the agency's behalf filed briefs in at least eight district courts on Oct. 13 and 14 asking judges to hold proceedings until the 6th Circuit decides which courts have the power to consider suits over the CWA rule -- which the appellate court has said could come as soon as November. The 11th Circuit in a related case is also weighing whether challenges to the rule belong in federal district or appeals court. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185713)

"As the court designated to hear all of the petitions for review, the Sixth Circuit's decision on whether it has jurisdiction . . . will have a direct bearing on the question of district court jurisdiction, and its schedule for briefing of this issue allows for prompt resolution. Therefore, this Court should enter a stay of proceedings until the Sixth Circuit decides this issue," DOJ says in an Oct. 13 brief filed with the U.S. District Court for the District of North Dakota, where a suit is pending from an alliance of 13 states critical of the CWA rule.

Substantively identical petitions from DOJ are also pending in other courts including two district courts in Texas, two in Oklahoma, and one each in Ohio, North Dakota, California and Georgia.

DOJ's push to temporarily stay the district litigation over the rule mirrors its request to the 11th Circuit to halt further briefing in a pending appeal of another district court challenge until the 6th Circuit issues a decision on which courts can properly review the CWA jurisdiction rule.

Under the CWA only challenges to specific types of rules must be initiated at the appellate level, while others should be brought to district court. But it is unclear which category a rule governing the reach of the act falls under, which has led challengers to file an array of suits at both levels of federal courts.

Petitions for appellate review of the CWA rule have been consolidated in the 6th Circuit, while a host of district court cases are pending across the country after the panel of judges that weighs multi-district litigation ruled Oct. 13 against EPA's request to consolidate the lower court suits.

EPA and the U.S. Army Corps of Engineers jointly crafted the rule to end confusion about the water law's reach stemming from a 2006 Supreme Court decision that created competing tests for jurisdiction. While the agencies say that the rule provides long-sought clarity on the law's scope, industry and state critics say it is unlawful and extends the agencies' reach far beyond what Congress intended when it crafted the water law.

The 6th Circuit, which is hearing consolidated petitions for appellate review of the rule, has set a Nov. 4 deadline for parties' briefing on the question of which court has authority to hear suits over the rule. The court announced Oct. 20 that it would hear oral argument Dec. 8.

DOJ in the new district court briefs says the prospect of a quick ruling means there is little harm in staying the district court suits -- especially after the appeals court stayed the rule nationwide on Oct. 9. EPA is currently using George W. Bush-era policy on CWA jurisdiction in lieu of implementing its rule.

"Plaintiffs' interests are protected because the Sixth Circuit has issued a nationwide stay of the Clean Water Rule pending further order of that court. The Agencies seek only a temporary stay of proceedings in this Court until the Sixth Circuit decides whether it has jurisdiction," DOJ says in its brief to the U.S. District Court for the Southern District of Ohio, where Ohio, Michigan and Tennessee are seeking review of the rule.

An EPA spokeswoman in response to the nationwide stay of the regulation says the agency and the Corps "respect the court's decision to allow for more deliberate consideration of the issues in the case and we look forward to litigating the merits of the Clean Water Rule. . . . The agencies' prior rule will remain in effect nationwide and we will continue to apply the best science and technical data on a case-by-case basis to waters at issue."

However, challengers to the rule are already arguing that there is no reason to wait for a 6th Circuit ruling because a decision from a circuit court is only binding on judges within that circuit, and the only district court challenge pending within the 6th Circuit is the Ohio case. In every other suit, the 6th Circuit's opinion will be merely advisory.

For instance, in an Oct. 13 brief to the North Dakota court on scheduling -- filed ahead of DOJ's latest request for a stay -- the 13 state plaintiffs there urge the court to quickly advance their suit.

"This Court has already established the basis for its jurisdiction and need not wait for the Sixth Circuit to concur with its ruling to allow this case to proceed," the brief says.

In the North Dakota case, Chief District Judge Ralph Erickson in August held that district courts have authority over the rule and granted an injunction against the rule's implementation that applies only within the borders of the 13 states suing in North Dakota.

Two other district courts have also ruled on jurisdiction but reached the opposite conclusion, with U.S. District Court for the Southern District of Georgia Judge Lisa Wood and U.S. District Court for the Northern District of West Virginia Judge Irene M. Keeley holding that appellate court is the proper venue and dismissing challenges by states and industry, respectively.

Wood's decision led to the appeal now before the 11th Circuit, State of Georgia, et

al., v. EPA. The 11 state plaintiffs in that suit are seeking a swift determination from the 11th Circuit that it lacks authority to hear suits over the rule and sending their case back to the district court. -- David LaRoss

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News Headline: AGENCIES, ADVOCATES EXPLORE ALTERNATE ESA TOOL TO EASE CONSULTATION |

Outlet Full Name: Inside EPA

News Text: Lawyers with EPA, the U.S. Fish and Wildlife Service (FWS) and the Defenders of Wildlife are exploring what they think could be one novel solution to the ongoing challenge of dealing with Endangered Species Act (ESA) reviews and consultations between EPA and the service agencies over pesticide registration decisions.

Representatives for FWS and the environmental group presented the concept at a recent pesticide law seminar sponsored by the American Bar Association and CropLife America.

EPA and the federal wildlife agencies -- FWS and the National Marine Fisheries Service (NMFS) -- have been embroiled for years in an ongoing struggle to determine how to mesh EPA's authority to register pesticides for use per the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) with FWS and NMFS' responsibility to protect endangered species through their ESA authorities.

Environmentalists' lawsuits over the past decade have heightened the tension, leading the agencies to seek advice from the National Academy of Sciences (NAS) on how to collaborate and courts to set strict deadlines by which the services must complete ESA reviews of listed species impacted by various pesticide registrations.

Consultations between EPA and the services over pesticide registrations are conducted under ESA section 7(a)(2), which requires such consultation for any federal agency decision or project that will adversely affect a listed species or its habitat.

But the speakers at the Oct. 14 law event said use of a complementary but rarely used section of the statute, section 7(a)(1), which encourages agencies to undertake conservation measures to improve listed species' lot, could improve the situation.

"At FWS, we believe that [ESA section] 7(a)(1) results in better consultations and can streamline [section] 7(a)(2) and decrease the likelihood of jeopardy and adverse modification requests," said Gina Shultz, FWS deputy assistant director of ecological services.

Shultz described section 7(a)(1) as directing "federal agencies [to] provide benefit to listed species and critical habitat. It can provide a more comprehensive, landscape-leveling approach to conservation rather than [assessing] project by project," Shultz said. She added that using a section 7(a)(1) approach "can definitely reduce and streamline 7(a)(2) consultations."

Jake Li, an attorney with Defenders of Wildlife, acknowledged that the idea is "venturing into new territory," but added that the goal of ESA is to move listed species back to recovery, and this can be accomplished through the "meta effect of sections 7(a)(1) and 7(a)(2)."

Li and Shultz explained that conservation measures an agency takes under a section 7(a)(1) approach to improve listed species' situation, or to offset the negative impacts on species or its habitat, may be able to overcome or reduce impacts of concern raised in consultations required under section 7(a)(2). Such measures need to benefit or promote species' recovery, must be an integral part of the proposed federal action, and minimize or compensate for the proposal's effects on listed species, Li said.

Li added that "the benefits really need to outweigh the impacts" on a listed species, giving the example of stream restoration activities needing to outweigh the impacts that pesticide use is expected to have on that stream's species.

"By helping species to recover, an agency may be able to streamline 7(a)(2) [consultation], if the beneficial effects more than overcome 7(a)(2)," Li said.

Li, however, acknowledged that using this approach in pesticide registration decisions differs from using it in construction or development activities that agencies undertake. He said that one important difference is that with pesticide decisions, there are other actors besides the agencies: the pesticide companies and the growers that use the pesticides.

"Growers and registrants often ask how they can do things [to reduce risks to species] and get credit for them," Li said. "It's not just the actual agency, it's the registrant helping the agency, it's very interesting and novel."

Li said that the benefits to the services proposed under the section 7(a)(1) approach could be written into biological opinion written by the services to make them enforceable. If a consulting agency doesn't follow through on its proposal, the services could re-open the section 7(a)(2) consultation. These measures could also be included in a pesticide's FIFRA registration, Li adds.

EPA and federal wildlife officials in 2013 unveiled new "interim approaches" for assessing potential risks of pesticides per the ESA, though they cautioned the new process, based on NAS advice, was a work in progress and that early implementation would be limited due to resource concerns. The agency has announced that it will undertake five ESA reviews under the new process, with the first draft documents

expected for release in the coming months.

Although EPA along with FWS and NMFS, held meetings and conference calls in 2014 to continue development of the interim approaches, observers say they have had little opportunity to see the results of those federal efforts, and that the preliminary risk assessments scheduled to be released for public comment in 2015 may indicate how federal officials will address certain challenges.

And the agencies have declined to extend these new methods to other chemicals' reviews, citing resource constraints, particularly at the small service agencies that are responsible for assessing the registrations' impacts on listed species, whether these impacts place the species in jeopardy, and how to mitigate these impacts. -- Maria Hegstad

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News Headline: EPA ADVISORY PANEL ENCOURAGES FULL LEAD SERVICE LINE REPLACEMENTS |

Outlet Full Name: Inside EPA

News Text: An EPA advisory panel is recommending that the agency provide public water systems with suggestions for how the systems can encourage full replacements of lead service lines, including "creative" financing options for low-income communities as a way to address environmental justice concerns.

The final draft of recommendations from the National Drinking Water Advisory Council (NDWAC) Lead and Copper Rule (LCR) Working Group details plans to strongly encourage full lead service line replacement (LSLR), by setting goals for replacement, working with customers to speed up replacement and receiving credit for replacement of lead-containing connecting pipes and/or confirmation that a service line initially inventoried as an LSL is not lead. The draft recommendations are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185679)

The full NDWAC is scheduled to finalize the report at a Nov. 17-19 meeting in Washington, D.C.

Earlier this year, the LCR work group moved away from the possibility of requiring water systems to conduct full LSLRs, even though the advisors acknowledge there is no safe level of lead exposure and that EPA's Science Advisory Board has concluded that partial LSLR does not reliably reduce lead levels in drinking water. The group determined that EPA only has the authority to strongly encourage full LSLR.

Instead, the final recommendations advise EPA to require a "proactive" LSLR program that sets replacement goals, engages customers in implementing those goals and provides improved access to information about LSLs, rather than current

requirements in which LSLs must be replaced only lead levels in drinking water exceed an "action level."

The report also calls on EPA to strengthen corrosion control treatment (CCT); modify monitoring requirements to provide for customer-requested tap samples and to assess the effectiveness of CCT; establish a health-based, household action level that triggers a report to the consumer and to the applicable health agency for follow up and separate the requirements for copper from those for lead, with new requirements targeting water that is corrosive to copper.

"Although leadership by EPA is essential, reduction of exposure to lead in drinking water cannot be achieved by EPA regulation alone," the report says. "Thus, this report also includes recommendations for renewed commitment, cooperation and effort by government at all levels and by the general public."

During its deliberations, the work group debated whether the definition of "control" should be changed in the rule, which would allow EPA to mandate full LSLR, but did not reach consensus.

In the current LCR, when a system exceeds the lead action level, EPA requires the system to replace only that portion of the LSL that it owns, based on the agency's current interpretation of the term "control." Some work group members urged that the definition of control as "ownership" should be replaced with a requirement that public water systems must replace the entire LSL where they have the authority to "replace, repair, or maintain" the line or where they have other forms of authority over the LSL, the report says.

But the work group says it recognizes that some utilities are prevented by law from spending public funds on private property and that gaining physical access to private property poses significant legal issues when a property owner objects.

Therefore, it recommends that the revised LCR require public water systems to clearly state how the system defines ownership of LSLs, who has what financial responsibility for the replacement, what the legal basis is for that determination and any financial assistance programs that may be available.

In places where the water system requires the property owner to pay a share of the costs for removing the LSL, EPA should encourage the use of creative financing mechanisms, the report says. "Leaving a lead service line in place because a low-income resident does not have the means to pay raises serious questions of disparate impact and environmental justice."

But EPA will need to work with other federal agencies to address these environmental justice concerns, the work group says.

Some of the financing may come through the creation of a federal tax deduction to

support replacement of the customer portion of LSLs and working with Health & Human Services and Housing & Urban Development departments "to modify funding guidelines for the Healthy Homes and other federal funding programs to explicitly authorize and prioritize the use of those funds for lead service line removal programs targeting the privately owned portion of any lead service line," the report says. "The current situation of having tens of thousands of dollars spent by a local Healthy Home or lead poisoning prevention program to remove lead paint, and leave behind a lead service line because of arbitrary funding guidelines is unacceptable."

The work group says it "considered but did not quantify the cost implications of its recommendations," adding that an important factor in the group's deliberations was the principle that water system and state resources should be focused on actions that achieve the greatest public health protection. Because LSLR programs will be costly in some locations, the work group encourages water systems "to incorporate anticipated costs into their capital improvement program as appropriate to their situation, and urges states to include the costs of LSL replacement in their criteria for allocation of Drinking Water State Revolving Funds." -- Amanda Palleschi

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News Headline: EPA SENDS STORM SEWER GENERAL PERMIT RULE FOR OMB REVIEW |

Outlet Full Name: Inside EPA

News Text: EPA has sent for White House Office of Management & Budget (OMB) review its draft rule to rework aspects of the Clean Water Act (CWA) general permit program for smaller municipal stormwater systems -- the first step in satisfying a settlement with advocates that requires EPA to propose the revised rule before the end of 2015.

The proposed rule, which OMB received Oct. 17, follows a U.S. Court of Appeals for the 9th Circuit's ruling from 2003 in Environmental Defense Center (EDC), et al. v. EPA, where the court ordered EPA to revise its policy for small municipal separate storm sewer systems (MS4s) and other stormwater rules -- steps the agency still has yet to take.

In the 2003 decision, a unanimous three-judge panel of the court ordered the agency to revise its "Phase II" general permit for small MS4s, which covers municipalities with populations under 100,000, small construction sites and "nontraditional" MS4s such as schools and some federal and state facilities.

The panel said in its ruling that because stormwater management plans crafted under a phase II permit were exempted from public review or approval by state or federal regulators, there was no guarantee that the plans would satisfy the CWA mandate to reduce stormwater pollution to the "maximum extent practicable."

Entities subject to the phase II permit must submit the plans, which detail how they intend to control stormwater runoff, but environmentalists have claimed the lack of oversight means those strategies are often ineffective.

9th Circuit Judge James R. Browning agreed with those claims in his opinion for the panel, writing that "In fact, under the Phase II Rule, in order to receive the protection of a general permit, the operator of a small MS4 needs to do nothing more than decide for itself what reduction in discharges would be the maximum practical reduction. No one will review that operator's decision to make sure that it was reasonable, or even good faith."

EPA signed a settlement on Aug. 26 with environmentalists who sued in the 9th Circuit to enforce the EDC decision, and the circuit court approved the pact on Sept. 14. Under its agreement the agency must propose a new Phase II stormwater permit by Dec. 17, and finalize it by Nov. 17, 2016.

The settlement also requires EPA to issue a determination by May 26, 2016 on whether, and if necessary how, it should regulate stormwater discharges from forest roads under the CWA. Under the agreement that determination will come after EPA takes public comment on "the effectiveness of existing federal and State regulatory and non-regulatory programs as well as private third-party certification programs" -- a process slated to begin in November.

The current rulemaking represents EPA's second effort to overhaul its urban stormwater rules. It pledged in 2009 to revise regulations governing small MS4s, and in 2012 announced that it was considering options for regulating forest road runoff through the phase II program.

But the agency abandoned that rulemaking effort in 2014, and EDC, along with the Natural Resources Defense Council, filed suit in the 9th Circuit Dec. 18 to force agency action, ultimately leading to the Sept. 14 settlement.

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News Headline: DRAFT EPA SELENIUM WATER CRITERIA SPURS COMPETING CLAIMS OVER STRINGENCY |

Outlet Full Name: Inside EPA

News Text: Draft EPA criteria designed to help states write Clean Water Act (CWA) permits that protect aquatic life from the mining-related contaminant selenium are spurring competing claims over the criteria's stringency, with states and groups representing various industries saying they are too strict while advocates are they must be strengthened.

The arguments are detailed in recently filed comments on EPA's draft criteria published in the July 27 Federal Register, and for which the agency is seeking comment on through an extended Oct. 30 deadline. Many groups filed comments ahead of an earlier Oct. 10 deadline, which the agency then extended.

EPA revised the criteria from a 2014 proposal that was based solely on fish tissue after environmentalists raised concerns that the fish tissue numbers are difficult to enforce. The new draft allows for limits based on water column values in "fishless" waterbodies or those where selenium discharges have recently increased.

The revisions include new fish egg/ovary values of 15.8 milligrams per kilogram (mg/kg) of bodyweight and 8 mg/kg for whole body fish tissue or 11.3 mg/kg for muscle. The agency's earlier 2014 criteria would have set values of 15.2 mg/kg for egg/ovaries and 8.1 mg/kg for whole body fish tissue or 11.8 mg/kg for muscle tissue.

The water column values for the revised criteria are 1.2 micrograms per liter (ug/L) for lentic aquatic systems, or standing water, and 3.1 ug/L for lotic, or flowing, waters, compared to the 2014 draft criteria of 1.3 ug/L for lentic systems and 4.8 ug/L for lotic systems. The draft values for fish tissue, as with the 2014 criteria, would override the water column numbers in situations where both types are available, because "fish tissue-based concentration is a more direct measure of selenium toxicity to aquatic life than water column concentrations," EPA says.

The agency's current enacted selenium criteria, which were adopted in 1987, set traditional water column concentration values of 5 ug/L for chronic exposures and 20 ug/L for acute exposures.

EPA in the July 27 Register notice said selenium is "a naturally occurring chemical element that is nutritionally essential in small amounts, but toxic at higher concentrations,"

The agency added that it "is updating its national recommended chronic aquatic life criterion for selenium in freshwater to reflect the latest scientific information, which indicates that selenium toxicity to aquatic life is primarily driven by organisms consuming selenium-contaminated food rather than by being directly exposed to selenium dissolved in water" (Inside EPA, July 31).

In response to the draft, a coalition of 14 environmental groups say in joint Oct. 9 comments that the revisions are not strict enough and that only a water column standard will be enforceable.

"Our experience enforcing the selenium standard in central Appalachia has taught us that the only way that coal operators and others in the region will be compelled to comply with selenium standards is if there is an enforceable water column number. We expect that this is true in many other areas of the country as well," the groups say

in their comments. Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 185742)

Environmentalists argue in their comments that a regime for collecting and testing fish populations for selenium levels will be too expensive and complex to implement easily. Regulators "whose resources are already stretched far too thin are unlikely to develop and implement the complex, expensive fish sampling and testing protocols necessary . . . to the extent that such protocols are even possible to develop," the comments say.

The groups argue that EPA should at least expand the situations where water column limits rather than fish tissue measurements will be applied, and shrink the period over which water quality sampling must occur from a 30-day window to four days to make the limit practicable.

"At least one federal judge has interpreted a four-day average as requiring four consecutive days of sampling. Such an interpretation applied to a 30-day standard would make it impossible for citizen groups to monitor compliance with a selenium water quality standard and would greatly increase the cost to states of determining compliance with the standard," the comments say.

Meanwhile, organizations representing several industrial sectors in their comments praise the criteria's focus on fish tissue concentrations, arguing that since fish are only affected by selenium when they ingest the chemical no other measure will accurately assess potential harms.

"Use of this approach will allow for a more direct assessment of the beneficial use impacts associated with selenium exposure and should significantly minimize unnecessary and costly selenium treatment controls in systems currently achieving these direct beneficial uses," the California Association of Sanitation Agencies says in Sept. 25 comments.

However, while they back the proposal's overall focus on fish tissue limits, many industry groups say the draft criteria still place too much emphasis on the water column. Variances in individual waterbodies' hydrology and aquatic life make a single nationwide standard for selenium concentration all but impossible, they say.

"[B]ecause nationwide water column-based criteria cannot not be derived reliably, we advise EPA to only recommend water column-based criteria be developed on a site/state/region-specific basis," say comments from the engineering and science firm GEI, which were submitted as identical but separate submissions from the National Mining Association, Colorado Wastewater Utility Council, and other industry groups.

The West Virginia Coal Association (WVCA) in Oct. 9 comments goes farther to say that EPA's recommendations on applying water column criteria cross over from

recommending model criteria to dictating how states should implement the proposal. "EPA attempts to reach too far with its 'guidance' on implementation of the selenium criteria. These decisions must be made based on each specific circumstance. If EPA disagrees with a permitting or stream listing decision, we have no doubt that EPA will exercise its authority to express its concerns to the State," it says.

WVCA specifically attacks the proposal that states apply water column criteria in "fishless" waters, arguing that regulators should instead sample downstream fish tissue concentrations when a waterbody has few or no fish.

"EPA's recommended approach is nonsensical. . . . An assumption that segments without fish must have selenium concentrations lower than segments with fish defies logic," the comments say.

States, similar to the industry groups, generally back EPA's proposal to base its criteria primarily on fish tissue. However, their comments focused largely on the science underlying EPA's specific proposed limits on selenium concentrations, and the need for guidance on implementing the criteria once it is finalized.

"Other fish tissue criteria developed by EPA, such as the methyl mercury fish tissue based water quality criterion, have been difficult to implement. We see no evidence that this criterion will be any different," Pennsylvania says in Sept. 25 comments.

Pennsylvania and Texas both call on the agency to release a technical guide for measuring concentrations of selenium in fish tissue alongside the final criteria or even before it.

"The concepts and methodologies used by EPA to develop this criterion, as well as the recommendations on how this multi-medium based criterion is to be implemented, are relatively new," Pennsylvania says.

Kentucky, in Sept. 23 comments, focuses on the studies EPA used to inform its proposed selenium limits. At least one, a 2006 report of effects from selenium injected into fish eggs, "does not meet the appropriate standard of rigor" because injection and ingestion produce different effects, the state says.

It adds that without the 2006 "Linville" study, EPA would have likely arrived at less stringent limits for selenium.

Kentucky also calls for EPA to define the quantity of new selenium discharges that would trigger the use of water column criteria. "There are countless scenarios that create implementation challenges for states" under that language, it says. -- David LaRoss

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News Headline: Hanover officials hope rate hike will curb water use | .

Outlet Full Name: Enterprise - Online, The

News Text: ...water to be watering our lawns,” Diniak said. He said the town also has water-quality issues, and infrastructure needs at its three...

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